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IN THE

Supreme Court of the United States

October Term, 1952.

No. 385.

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*,

v.

NATIONAL BROADCASTING COMPANY, Inc., *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR RESPONDENT.

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IN THE

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OCTOBER TERM, 1942.

No. 585.

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner,*

v.

NATIONAL BROADCASTING COMPANY, INC., *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The opinions in the United States Court of Appeals for the District of Columbia reported at 132 Fed. (2nd.) 545 appear at pages 183-213 of the record.

The Findings of Fact and Conclusions of the Commission are at pages 27-46 of the record. The Commission's Order with the dissenting memorandum of Commissioners Case and Craven is at pages 50-52 of the record.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended.

QUESTIONS PRESENTED.

The questions presented are:

1. Did Respondent have a right to appeal under Sec. 402 (b)(2) of the Statute?

2. Was Respondent entitled, as a matter of right, to a hearing before the Commission on the WHDH application before said application was granted?

3. If so, were the requirements of the statute and of due process satisfied when Respondent was permitted to file a brief and make oral argument *amicus curiae*?

4. Did Respondent, under the circumstances in this case, have a right to rehearing under Sec. 405 of the Statute?

5. Were the Commission's proceedings valid under Section 409(a) of the Statute?

6. Were the proceedings, including the Commission's failure to observe its own rules, so arbitrary and capricious as to invalidate the results reached?

STATUTES AND TREATY INVOLVED.

In addition to the sections of the Communications Act and of the Commission's Regulations appearing at pp. 63-67 of Petitioner's Brief, Respondent regards as pertinent Sec. 1.71 and 1.72 of the Commission's Regulations; Sec. 405 and 409(a) of the Communications Act and par. B 8(d) of Part II of the North American Regional Broadcasting Agreement. These are printed as an appendix to this Brief at p. 48.

STATEMENT.

Respondent considers the following statement necessary in addition to that contained in Petitioner's Brief.

The Commission has found that there will be interference to KOA from WHDH in the eastern part of the United States (R. 32). This interference to KOA's secondary sky-wave service, which exists only at night, is the interference of which Respondent complains. If the injury to KOA and to the public is to be evaluated, the nature and function of secondary service and the distinction between primary and secondary service must be understood.[1]

Though sky-wave signals vary in intensity, nearly all receivers now in use employ automatic volume control which permits a constant output from the loudspeaker despite variations in the incoming signals. The Petitioner's Brief, at page 45, concedes that, in the absence of interference, "there is no sharp line of demarcation within which the secondary service is satisfactory and outside of which the secondary service is unusable or unsatisfactory." The phenomenon of sky-wave reflection plays an important part in the Commission's Allocation Plan.

It is one of the Commission's duties under Sec. 307(b) of the Statute to maintain a "fair, efficient and equitable distribution of radio facilities." Responsive to this section of the Act, the Commission in its Report to Congress for the year 1938 set forth the results of a study of service rendered by United States standard broadcast stations. (FCC 4th Annual Report, App. F, p. 180 et seq.) This study reveals that at night, because they live outside the primary service area of any broadcast station, 5.6 per cent of the urban population and 32.4 per cent of the rural population, which together equal 21,308,453 persons or 17.4 per

[1] The Commission asserts that the operation of WHDH will not cause interference to KOA within KOA's primary service area—i. e. within 100 miles of Denver where KOA delivers a relatively constant ground-wave signal day and night (R. 32). We do not dispute this assertion.

cent of the total population of the United States, have no broadcasting service except sky-wave signals from clear-channel stations (FCC 4th Annual Report, Table VI, pp. 198-199). The study further discloses that the areas in which listeners must depend upon secondary service comprise 56.9 per cent of the total land area of the United States (FCC 4th Annual Report, Table VIII, pp. 202-203).[2]

KOA, one of the stations upon which this audience must depend, has been operated continuously at Denver, Colorado, since December 15, 1924 (R. 2). From November 11, 1928, until April 7, 1941, the date upon which the Commission granted the WHDH application, KOA was licensed to operate on a frequency classified first by the Federal Radio Commission and thereafter by the Federal Communications Commission as a clear-channel upon which only one station would be permitted to operate during night hours (R. 2, 3, FCC Regs. Sec. 3.22, 3.25).

Consequently, during this period of more than twelve years, KOA's signals throughout the United States were free of co-channel interference at night from any station located within the United States. In addition, prior to the action of the Commission in this case, KOA's signals throughout the United States were both free and entitled to remain free of co-channel interference from any station in Canada, Mexico or Cuba under the provisions of the North American Regional Broadcasting Agreement (R. 41, 42).

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[2] In its Report to Congress for 1936, the Commission submitted a survey of rural listener preferences for clear, regional, and local channel stations which showed (F.C.C. 2d Annual Report, p. 64):

"National rural listener preference by channels

Station Classification	Per cent	Number of stations licensed
Clear channel	76.3	95
Regional channel	20.6	277
Local channel	2.1	256
Foreign	1.0	....

As one result of the Commission's Order of April 7, 1941, granting the WHDH application, KOA does not now render interference-free night service east of a line drawn from northern Minnesota to central Michigan thence to Louisiana—roughly the area lying east of the Mississippi River (Applicant's Ex. A at R 143).

As a second result of the Commission's Order of April 7, 1941, Canada, Mexico and Cuba, the other signatories to the North American Regional Broadcasting Agreement, have, or may acquire, the right to operate stations which cause co-channel interference at night on 850 kilocycles within the United States, a right which they did not have prior to the Order (R. 41, 42).

The service formerly available from KOA to listeners living east of the Mississippi River has not been replaced by an equally useful service from WHDH. On the contrary, WHDH does not render a useful service beyond an area, roughly semi-circular, not more than 60 miles by 30 miles at its greatest dimensions with Boston as its mid-point (Intervenor's Ex. 20, R. 115). At least eight stations in addition to WHDH render primary service at night to all or parts of this Boston area.

Thus the grant to WHDH adds another primary service to an area already surfeited with primary reception while listeners east of the Mississippi River, many of whom get only sky-wave service, except those in the immediate vicinity of Boston, have suffered a net loss of one secondary service under the Order of April 7, 1941.

Notwithstanding that the Regulations of the Federal Radio Commission and of the Federal Communications Commission at all times precluded the operation of a second station at night on KOA's frequency, between 1929 and 1938 Matheson Radio Company filed nine separate applications each of which requested unlimited time operation for WHDH on the KOA clear-channel. All of these applications prior to the one which is involved in the instant case, dated July 27, 1938, were dismissed or denied by the Commission (R. 54, Footnote 1, 2).

When the WHDH application of July 27, 1938 was filed, and at all times since, the Commission's Rules of Procedure have prescribed that an application not filed in accordance with its regulations will be considered defective, will not be considered by the Commission and will be returned to the applicant (Sec. 1.71 on p. 48 of the Appendix to this Brief). Its Rules further provide that where an applicant desired to challenge the validity or wisdom of any rule or regulation, he should submit a formal Petition setting forth the desired change and his reasons in support thereof (R. 54, Sec. 1.72 at p. 48 of the Appendix to this Brief). No such petition was ever filed on behalf of WHDH (R. 55, Footnote 3).

All of these Rules and Regulations were in effect, when, on September 2, 1939, the Commission issued its first Notice of Hearing (R. 11). This Notice indicated that, even in the absence of a Petition from the Applicant, the Commission might make some changes in Sec. 3.22 and 3.25 of its substantive regulations. Respondent sought to intervene (R. 13). Its Petition was denied by Commissioner Payne (R. 13-20) and his action was affirmed by the Commission (R. 21-24).

On September 29, 1939, Respondent moved to dismiss the WHDH application for its failure to conform to the Commission's Rules and Regulations (R. 20-21). This motion was denied on December 5, 1939 (R. 26, 27).

Meanwhile, on November 20, 1939, the Commission had designated Commissioner Case to preside at the hearing (R. 25). This designation is significant in view of the type of notice then outstanding and the provisions of Sec. 409(a) of the Statute limiting the kind of hearings which can be assigned to an Examiner (App. p. 49).

But no hearing was held under the original Notice of September 2, 1939. Instead, on December 2, 1939, the Commission issued a new Notice of Hearing (R. 25, 26). This second Notice, particularly when contrasted with the first, indicates that the Commission no longer contemplated a *mod-*

ification of Sections 3.22 and 3.25 but intended merely to give the Applicant an opportunity to *construe* them in the Applicant's favor, if that were possible (R. 25, 26). This being an appropriate subject for hearing before an Examiner under Sec. 409(a) of the Statute, Commissioner Case was relieved and Mr. R. H. Hyde was assigned as an Examiner to preside at the hearing (R. 27).

The hearing was held on January 29 and 30, 1940; the Respondent not being allowed to appear as a party. On December 9, 1940, the Commission released its "Proposed Findings of Fact and Conclusions" (R. 27-46). Five members of the Commission participated of whom two dissented. All five agreed that Sec. 3.22 and 3.25 of the Commission's Regulations did preclude the granting of the WHDH application (R. 30, 35, 45). Having reached this conclusion, three members of the Commission, without further notice or hearing to anyone, voted to modify Sec. 3.22 and 3.25 and having done so, voted to grant the WHDH application (R. 27-32). Respondent then filed its second Petition to Intervene on December 16, 1940 (R. 46-49) which was denied on January 7, 1941 (R. 50). Thereafter on its own motion and not at the request of Respondent, the Commission allowed both Respondent and the "clear-channel group" to file briefs and make oral argument *amicus curiae*. On April 7, 1941, the Commission adopted its final Order amending Sec. 3.25 of its Rules and granting the WHDH application (R. 50). Commissioners Case and Craven dissented.

Respondent's Petition for Rehearing, filed under Sec. 405 of the Act (R. 52) was denied on May 20, 1941 (R. 63). On May 21, 1941, Respondent declared its intention to appeal to the Court of Appeals and petitioned the Commission to stay the issuance of any construction permit to Matheson Radio Company, Inc., until the final determination of such appeal. (R. 85, 86.) The Commission denied this request for stay on June 12, 1941 (R. 86-90). Respondent's notice of its appeal to the Court of Appeals was filed April 7, 1941 (R. 1).

SUMMARY OF ARGUMENT.

In this case Respondent challenges both the result reached and the methods employed by the Commission in reaching that result. But principally it challenges the methods employed, for by these methods the result was not only made possible but the formulation of a proper record upon which a different result could have been reached was made impossible.

1.

Respondent alleges and the Commission concedes that KOA will experience interference from the operation of WHDH. It is therefore a person aggrieved and whose interests are adversely affected under Section 402(b)(2) of the Statute. (*FCC* v. *Sanders Brothers Radio Station*, 309 U. S. 642). Petitioner's contention that the *Sanders* case limits the right of appeal to those who suffer financial injury is erroneous.

2.

Respondent twice attempted to become a party to the administrative proceedings upon the WHDH application before the order granting that application was entered. It filed a Petition to Intervene before any evidence was taken upon the application. It filed a second Petition to Intervene after the submission of the Commission's Proposed Findings and Conclusions when it became apparent that the Commission would or might reach a result never contemplated by the proceedings had and the evidence taken. Both Petitions were denied upon the theory that the Commission is required only to hear an applicant and that it has no obligation to hear those who desire to oppose any application.

Respondent had a substantial interest in any action taken upon the WHDH application. The refusal of the Commission to permit Respondent to offer evidence and to test and refute that offered in support of the application involved an erroneous interpretation and application of its own rules (Section 1.102); a misconception of the Commission's power

and authority under the Act; and a violation of the due process clause of the Fifth Amendment to the Constitution of the United States. The Commission's position was not only erroneous; it was such as to make its final Order entirely void.

3.

The Commission was without power to grant the WHDH application without an amendment of Section 3.25 of its Rules. An amendment of that rule to permit the granting of the application involved a substantial change in KOA's frequency assignment within the meaning of Section 303 (f) of the Act. This change, which could legally be made only with Respondent's consent or as a result of a public hearing, was made without hearing and over its repeated protests.

Even if the purported amendment to Section 3.25 had been made lawfully, the Commission was without power to modify KOA's license until Respondent had been afforded a hearing under Section 312(b) of the Act. The KOA license was more than a mere authorization to operate transmitting equipment; until such time as KOA's status was changed by proper legal action, the license authorized service to listeners.

4.

The Order complained of was the result of arbitrary and capricious action. The Commission first designated for hearing an application which under its Rules it had no power to grant. Then it committed a second error when it failed to invoke its own procedural formula (Section 1.71) for the purpose of curing the defects of substance in that application. All proceedings were therefore based upon a defective application and in violation of the Commission's Rules. Moreover, all proceedings were inappropriate to the result reached. After instituting a proceeding having a dual purpose (the possible amendment of its Rules and action upon the application in view of such amendment) it

abandoned all legislative issues and proceeded to conduct a hearing on strictly judicial issues. After such a hearing, it then proposed to and did decide the matter upon the issues originally specified and subsequently abandoned.

5.

Section 409(a) of the Act prohibits the delegation to examiners of hearings involving "a change of policy" by the Commission. The policy fixed by Rule 3.25 was that only one station would be permitted to operate on this frequency during nighttime in order that it might render the greatest possible secondary service. Here after assigning the case to an examiner who conducted the hearing upon issues involving no question of policy change, the Commission changed its policy and granted the WHDH application on the basis of the record made before the examiner. This makes all action taken on this record void.

6.

The Commission's Order ignores the Commission's duty imposed by Section 307 (b) of the Act to make and maintain a fair, efficient and equitable distribution of radio facilities. The order further ignores the adverse effect upon listeners in the United States of a reclassification of KOA's channel under the North American Regional Broadcasting Agreement. Both Section 307(b) and the Treaty are declaratory of the public interest. Without considering them, the Commission could not make the requisite statutory finding that public interest would be served by a grant of the WHDH application. Its refusal to consider them or to permit Respondent to offer evidence with respect to them was arbitrary and capricious.

7.

In denying Respondent's Petition for Rehearing the Commission reaffirmed every error previously made. All questions relied on here were presented in that petition and the Commission was urged to afford appellant administrative

relief. The denial of this petition was not merely erroneous. It was the last in a series of events which made the order appealed from entirely void as a denial of due process.

ARGUMENT.

A. Respondent Has Standing to Maintain Its Appeal.

Although in its Statement of Questions Presented Petitioner makes no reference to Respondent's standing to appeal, it nevertheless devotes a section of its brief to this question. (Petitioner's Brief, pp. 47-55.) The Commission suggests that Respondent is without an appealable interest because it has neither suffered nor alleged a sufficient injury from interference, and for the further reason that this Court's decision in *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, limits the right of appeal under Section 402(b)(2) of the Act to those persons who are financially injured.

At the outset, it should be noted, Petitioner does not argue that Respondent has mistaken its remedy and might have had a cause of action in some other court apart from Sec. 402(b) (2). In fact, Petitioner could hardly make such an argument in view of *Black River Valley Broadcasts* v. *McNinch*, 101 Fed. (2d) 235, 69 App. D. C. 311, Cert. denied 307 U. S. 623, 59 S. Ct. 793. Necessarily, therefore, it is the position of the Government that on questions of electrical interference there can be no judicial review of Commission decisions.

On the question of the sufficiency of the allegations of aggrievement, Mr. Justice Rutledge, speaking for the court below, said: (R. 188)

> "On its face, therefore, the notice charges that the order substantially modified the 'license of KOA, changed the class and character of its frequency, degraded the station's service under the North American Agreement; jeopardized thereby not only appellant's rights but the priority rights of the United States and therefore the interests, present and future, of the lis-

tening public, and created discrimination against rural and in favor of urban listeners contrary to statutory requirements. These reasons appear to be a sufficient showing of both private and public interest and of adverse affectation to sustain the appeal. They require that it be considered on the merits, that is, on the question whether appellant was wrongfully refused a hearing before the Commission."

The claim of insufficient allegations of injury from interference under the circumstances disclosed in this record is tantamount to a contention that in an appellate pleading one must restate *in toto* or substantially the contents of all pleadings acted upon below when error with respect to such action is assigned and relied upon. In this case, Respondent alleged injury from interference in its first Petition to Intervene (R. 13), in its Second Petition to Intervene (R. 46), and in its Petition for Rehearing (R. 52). The ruling on each of these pleadings was adverse and the ruling on each was assigned as error in the court below. Moreover, that Respondent's notice of appeal, when construed in its entirety, speaks clearly in terms of electrical interference and the injury resulting to the public and to Respondent from such interference is made clear by the language of Mr. Justice Rutledge just quoted.

As to the sufficiency and serious consequences of the interference itself, which is the gravamen of Respondent's interest in these proceedings, petitioner suggests that it was "slight" and, parenthetically, raises the novel proposition that Respondent's rights therefore should be commensurate. Extended discussion of this point should not be necessary for indeed the Commission's various statements made in these proceedings themselves make it exceedingly clear that Respondent's aggrievement is serious and substantial.

Most, if not all, of the doubt and controversy about the proper meaning of Section 402(b)(2) prior to the *Sanders* case arose where the injury claimed was financial rather than electrical. If the Commission did not then concede the

appellate standing of those claiming injury from electrical interference, it did in effect; it argued that injury from electrical interference was the most that was within the contemplation of Congress in enacting this section, and that it could not properly be extended to include those claiming injury from economic interference. (See decision in this case below, R. 186.) The *Sanders* case was taken to the Supreme Court by the Government largely to resolve the question of the appellate standing of one who claimed financial injury, and the opinion of the Supreme Court in that case must be interpreted in the light of the questions urged upon it.

But aside from considerations of case history, the opinion itself lends no support to the contention now made. What the court decided was that one claiming economic injury from Commission action did have standing to appeal to this court under Section 402 (b) (2); it did not decide that others did not. If any distinction can be made from the opinion of this court in the *Sanders* case, we submit that it runs in favor of rather than against one who claims injury resulting from electrical interference.

When this court had the *Sanders* case before it, it was in effect considering the unusual rather than the usual or customary basis for appeal. The court pointed out that:

> "The genesis of the Communications Act and the necessity for the adoption of some such regulatory measure is a matter of history. The number of available radio frequencies is limited. The attempt by a broadcaster to use a given frequency *in disregard of its prior use by others, thus creating confusion and interference*, deprives the public of the full benefit of radio audition. Unless Congress had exercised its power over interstate commerce to bring about allocation of available frequencies and to regulate the employment of transmission equipment, the result would have been an impairment of the effective use of these facilities by anyone. The fundamental *purpose of Congress in respect of broadcasting was the allocation and regulation of the use of radio frequencies by prohibiting such use except under license.*" (Italics supplied)

And again in failing to find any underlying business or competitive protection within the framework of the Communications Act but rather a cogent regard for the prevention of electrical interference, this court said:

> "In short, the broadcasting field is open to anyone, *provided there be an available frequency over which he can broadcast without interference to others,* * * *".

Further, this court said:

> "Plainly, it is not the purpose of the Act to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, *to permit a licensee who was not interfering electrically with other broadcasters* to survive or succumb according to his ability to make his programs attractive to the public." (Italics supplied.)

Can we conclude from these expressions that this court meant to hold that competition and financial injury were the exclusive bases for this legislation or were the only grounds on which one could claim adverse affectation or legal injury? Obviously, we can not. Respondent's position is concrete, goes to the very essence and heart of Federal regulation of broadcasting and is the very type of aggrievement which Congress considered as fundamental when it wrote Section 402(b)(2) allowing persons adversely affected to take an appeal. Respondent's notice of appeal asserted that by the action complained of it would suffer serious and substantial electrical interference resulting in a curtailment of its broadcasting service area. There can be no question but that the lower court rightly found that respondent had the necessary standing to appeal.

But even if there were doubt as to the meaning of the *Sanders* case it could scarcely persist after *Scripps-Howard Radio, Inc.* v. *F. C. C.*, 316 U. S. 4. Although in that case this court was limited in its review to a question certified by the court below as to its jurisdiction to issue a stay, the appeal was taken by a licensee claiming electrical interfer-

ence as does Respondent here. This court, on a certificate, ruled that the court below had the requisite jurisdiction to issue a stay. This court would certainly not have authorized the issuance of a stay order in that proceeding if it had entertained any doubt of the court's jurisdiction to hear the appeal in the first instance.

B. Respondent Was Improperly Excluded from the Administrative Proceedings.

While before the Commission this proceeding passed through several disjointed stages. We believe that the validity of certain broad claims made by our adversaries concerning Respondent's lack of right to participate in the administrative proceedings can best be examined by reviewing these several stages and the situation of Respondent with respect to each.

Broadly speaking, the proceedings before the Commission can be divided into three stages or phases. During the first stage of the proceedings—from September 2, 1939, the date of the issuance of the first Notice of Hearing, until December 2, 1939, the date of the issuance of the second Notice of Hearing—the Commission considered the WHDH application upon both a legislative and judicial basis. During the second stage of the proceedings—from December 2, 1939, the date of the issuance of the second Notice of Hearing, until December 9, 1940, the date of the issuance of the Commission's Proposed Findings and Conclusions—the the Commission purported to be considering the application solely upon judicial issues. During the third stage of the proceedings—from December 9, 1940, the date of the Proposed Findings, until April 7, 1941, the date of its Final Order granting the WHDH application, the Commission was considering the application upon both legislative and judicial issues as shown by the final action taken.

The First Stage of the Administrative Proceedings.

Laying aside all questions concerning Respondent's right to be heard upon any proposal involving a substantial change in its operating assignment under Section 303 (f) of the Act, Respondent was a party in interest and entitled to be heard in the first stage of the administrative proceedings for two reasons.

In the first place, Respondent, as the licensee of a dominant clear-channel station on the frequency involved, had a status to defend to the end that it might continue to render the maximum of interference-free service. This status was fixed by the Act, by rules and regulations promulgated by the Commission under the Act, and by the terms of its license granted by the Commission pursuant to both. In other words, as a licensee under the Act, Respondent had rights or privileges which were statutory in character (*Yankee Network* v. *Federal Communications Commission*; 71 Appeals D. C. 11, 107 F. (2nd) 212; *Tennessee Electric Power Company* v. *Tennessee Valley Authority*, 306 U. S. 118, 137). The first Notice of Hearing raised questions concerning a change in the status of Respondent and its station which, if made, would be accomplished by an amendment of Sections 3.22 and 3.25 of the Commission's Rules. Moreover, the questions thus presented were to be considered and determined upon the validity of the proposal made by the applicant, Matheson, in an individual license proceeding. The legislative issues presented were necessarily and inextricably related to issues which were judicial in nature and which could not properly be tried in Respondent's enforced absence.

In the second place, Respondent was entitled to participate in this proceeding for the purpose of testing the validity of the applicant's proposal if, as a legislative matter, the Commission decided that its Rule 3.25 was to be amended. In this event, Respondent was entitled, not to have its service area throughout the United States protected, as at present, from interference arising from

WHDH, but, to have KOA's service protected under the Rule as modified. The location of this contour and the respective rights and obligations of the two stations, therefore, depended upon the weight and character of the testimony submitted. Here again, rights were dependent upon facts which were to be interpreted in the light of the statutory standard; a judicial question was presented in which Respondent as the party whose rights were in jeopardy was entitled to be heard.

The Second Stage of the Administrative Proceedings.

Throughout the second stage of the administrative proceedings, Respondent was a party in interest for the second of the two reasons stated as existing at the first stage. By its Notice of Hearing dated December 2, 1939 the Commission had eliminated all legislative issues but Respondent was still a proper party in interest to the end that it might defend its position and status under the Commission's existing rules.

Due to the Commission's refusal to allow intervention, Respondent's participation at this stage was necessarily limited to taking such action as was required under the Commission's Rules to preserve an exception to that Order. Respondent was precluded from and therefore did not participate in the taking of the evidence before the examiner; likewise it was precluded from filing Proposed Findings and taking other procedural steps which were open to parties at this stage. Moreover, none of the Commission's contentions heretofore dealt with has any direct bearing upon events at this stage of the proceeding.[3]

[3] During the taking of the evidence before the examiner, at this stage of the proceeding, counsel for the applicant explained its theory of the case as follows (R. as certified pp. 383-387):

"Mr. Pierson: Mr. Examiner, I propose to make it clear before we start, we are not suggesting an amendment, or a change or a modification of the Rule; we are not attacking the Rule."

"* * * It is our view that all the rules of the Commission are general propositions designed and promulgated to meet

The Third Stage of the Administrative Proceedings.

The third stage of the administrative proceedings was commenced on December 9, 1940. On this date the Commission issued Proposed Findings in which it was indicated that the case would be decided upon issues not dealt with in the taking of evidence and which, contrary to all action taken during the second stage, involved both legislative and judicial issues. Respondent then, and before the Final Order of the Commission entered April 7, 1941, was a party in interest, for both of the reasons stated as existing at the first stage. It, therefore, on December 20, 1940, filed its second Petition to Intervene. On January 7, 1941, the Commission entered its Order denying this second Petition to Intervene. (R. 50)

Whether the Commission's action of December 9, 1940 be considered as a continuation of the original proceeding, as the record apparently makes clear (R. 54) or the commencement of a new proceeding as was suggested below by the intervener Matheson, is, for present purposes, unimportant. The Decision and Order finally entered was based upon is-

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general problems and general situations and when the facts of a general situation do not exist in a particular case, the Commission has the legal power and the legal duty to avoid the literal application and interpretation of the rule, especially when such literal application would be a means of avoiding service to the public interest."

"We maintain that only in that manner can the reasonableness and the legality of any rule be sustained and have any sanction of law.

"The applicant is of the firm conviction and intends to show that this case constitutes an exception to the general situation that Sections 322 and 325 were designed to meet.

"I wish to reiterate, we do not propose, or even to pretend to say that Sections 322 and 325 are not adequately meeting the general situation but that rule, properly interpreted and applied to this unique and peculiar situation that is the subject of this proceeding does not preclude the operation of WHDH as proposed.

"We propose to examine the general situation, as the examiner has so kindly given us a lead on it, and then proceed to prove that this case does constitute an exception."

sues which affected Respondent and its interests, upon which Respondent had not been heard and concerning which no one, including the applicant, had had notice prior to December 9, 1940. In either event and under either hypothesis, Respondent was entitled to become a party at this stage of the proceedings.

In addition to the errors already committed, the Commission was about to take action specifically prohibited by the statute in two material respects, was about to render a Decision and Order which would make a mockery of any pretense at orderly procedure and was about to render a Decision and Order which would adversely affect Respondent. The Commission's Rules on Intervention (Section 1.102) do not limit such action to any particular stage of the proceeding and even if intervention at this stage was not required, Respondent by its action in filing its second Petition at least put the Commission on notice of its claims before final action was taken and as soon as it was advised of the character of the action proposed.

It affords no answer to say, as the Commission does (R., p. 69) that this petition was "a premature petition for Rehearing". The Commission itself was responsible for the changes in the issues and the fact that it proposed to deal with the application upon a basis wholly different from that which had been contemplated at the time the record was made. The most that can be said against Respondent's action in filing this petition was that it was unnecessary; not that it operated to the prejudice of rights which Respondent had under the statute and which Respondent exercised when on April 25, 1941 it filed its Petition for Rehearing.

Over and above its unlawful conduct in refusing to permit respondent's intervention in the first stages of this proceeding, the Commission acted illegally, arbitrarily and capriciously when it failed to admit Respondent as a party at the third and decisive stage of the administrative proceedings. Then, if not earlier, Respondent was entitled to participate in the determination of those issues which af-

fected it both directly and as a source of service to the public. The refusal to admit Respondent as a party at any stage of the proceedings amounted to an assertion of power which under the Constitution is denied to all administrative agencies whose orders "impinge upon legal rights" (*Norwegian Nitrogen Products Company* v. *United States*, 288 U. S. 294, 318); it amounted to a denial of due process.

The majority opinion of the court below declares that Respondent's rights matured on December 9, 1940 when the Commission issued its "Proposed Findings of Fact and Conclusions" in which it proposed the amendment of Section 3.25 of the Commission's Rules and Regulations and the granting of the WHDH application. Mr. Justice Rutledge held that this was the first action of the Commission detrimental to Respondent's interests and that, therefore, the Petition to Intervene filed seven days later on December 16, 1940 should have been granted.

While we do not veer from our general position that Respondent's rights accrued in the initial stages of the administrative proceedings, we do agree that the greatest threat to Respondent's position occurred upon the issuance of the aforesaid Proposed Findings, and if there can be such a thing as degree of unconstitutionality, the Commission's action in denying Respondent's request to intervene at that stage was the most unlawful of all its actions in this case.

THE REQUIREMENTS OF THE COMMISSION RULE

The Commission's contention that respondent's first Petition to Intervene did not comply with the Commission's intervention rule (Section 1.102) turns on the meaning and effect of that part of the first sentence of the rule which requires that a proposed intervener must allege, in addition to other items specified therein, "the facts on which petitioner bases his claim that his intervention will be in the public interest." Its validity and effect must be tested not entirely as an abstraction but in the light of the situation of the parties and the facts which were admittedly within the Commission's knowledge.

These facts included, among others, (1) the fact that for a period of more than twelve years KOA had occupied an assignment which under the Commission's rules, was free from co-channel interference; (2) the fact that the assignment of WHDH for nighttime operation on this channel would be contrary to those rules which fixed the status of the channel and which were then in force and effect; (3) the fact that the nighttime operation of WHDH upon this channel with the power proposed would result in interference to KOA and to the service being rendered by it; and (4) the fact that when the Commission issued the notice of hearing to which the first Petition to Intervene was addressed, the Commission, on its own motion, brought into issue the question of the adverse effect by reason of interference on KOA.[4] The only uncertainty was within the control of the Commission, namely, the basis upon which WHDH would be permitted to operate during nighttime upon this channel, if at all.

Against this factual background, all well within the knowledge of this Commission, Respondent filed its Petition to Intervene asserting (1) that it operated Station KOA at Denver, Colorado, on 830 kilocycles with power of 50 kilowatts, unlimited time; (2) that the operation of Station WHDH as proposed in its application would cause interference to KOA in areas where the signal was then interference-free; (3) that Respondent would be aggrieved and its interests adversely affected should the WHDH application be granted; and (4) that the operation of WHDH as proposed would not be in the public interest, convenience and necessity.

Aside from the question of the Commission's broad assertion of power with respect to this rule, we submit that Respondent's petition complied with any reasonable and legal interpretation of the language of the rule. We believed

[4] At page 40 of its Brief, the Commission over-simplifies the problem by stating that the application of its Standards of Good Engineering Practice to the known facts gave data upon which the Commission exercised its judgment.

then and we believe now that any petition which contains the allegations made shows that the Respondent's intervention would be "in the public interest." This conclusion necessarily follows if by that term is meant compliance with orderly procedure, with due process of law and the statutory scheme of the Act as construed by the decisions of this court. But if the rule requires more, and the Commission contends that it does, what does it require and by what authority does the Commission impose such requirement?

We submit that it is impossible from the rule itself to determine what the Commission means from the phrase "in the public interest." Mr. Justice Rutledge said in the court below: "The language of the new requirement is ambiguous." We submit further that nothing which has been said about it by the Commission in the record or in its brief clarifies its meaning. The Commission goes to great length to recite in its brief its previous experience under a different rule where "substantial interest" was the test for intervention; it also makes the pious pronouncement that the present standard of intervention "was not adopted, as Respondent has suggested, for the convenience of the Commission but rather because the Commission's experience showed that the rights of applicants for new stations and the interest of the public in the maximum utilization of radio facilities were jeopardized by a procedure permitting unlimited intervention." (Petitioner's Brief, pages 21-22.)

However, the key Commission decision interpreting this rule rendered on the same day as, and used as a basis for denial of the KOA petition, makes no such disclaimer, and states unequivocally:

> "The underlying purpose of the present rule is to limit participation in proceedings, particularly on broadcast applications, to those persons whose participation will be of assistance to the Commission in carrying out its statutory functions." (*In re Application of Hazlewood, Inc.*, Docket 5698, R. 14-20.)

As to this construction, the court below quite properly said:

> "A rule which posits the basic right of hearing exclusively upon mere convenience to the Commission or whether the petitioner's participation 'will be of assistance to it in determining the issues,' leaving this to be determined solely in its discretion, is not reasonable. It is a denial of any right to hearing. That it may be inconvenient or time-consuming for such a body to hear persons substantially interested and affected, or that, in the Commission's exclusive discretion, they may not be able to aid it, furnishes no basis for refusal to hear their side of the case, whether on the facts or the law. Efficiency is not to be bought at such a price to essential fairness. * * *" (R. 198)

We concede that there may be cases where the interests of the proposed intervener are remote or not equally within the knowledge of the Commission where the Commission can properly require elaborate factual allegations to advise it of the nature and degree of its interests. But this is not such a case. Neither in the Order denying the Petition (R. 13) nor in the Commission's Order affirming the denial upon review (R. 24) nor at any other point has the Commission denied Respondent's interest in the WHDH application or the sufficiency of its allegations. The Commission itself was not only fully cognizant of Respondent's interest but in the court below flatly stated in its brief that "the Commission's decision denying appellant the right to intervene was not based upon appellant's lack of interest." Since adverse interest is a sufficient test to determine who may appeal under Section 402(b)(2) of the Act, it is unthinkable that the Commission may impose more stringent requirements upon persons who come before it in the earlier stages of proceedings prior to appellate review. If the Commission is correct in its interpretation of its own powers under this rule which it has created, it may in its discretion, conduct all of its hearings on an *ex parte* basis, and those claiming aggrievement are relegated to the absurd position of having no

rights before the administrative body although they are the exclusive agents through whom an appeal to the courts may be taken.

THE REQUIREMENTS OF THE STATUTE.

As this court has pointed out on several occasions, the primary purpose of the Communications Act is to minimize interference between stations to the end that maximum service to the public may be achieved. Because there are more applicants for the use of radio frequencies than can be accommodated consistent with this purpose, the Commission is given the power of selection between applicants under the standard of public interest, convenience and necessity.

In this case there were conflicting interests between WHDH and KOA to be decided under the statutory standard. Did the Act contemplate that both or either would be given a hearing before the Commission made its selection?

The Commission asserts that only WHDH was entitled to a hearing. It bases this conclusion, in part at least, upon Sec. 309(a) whereby, it says, "Congress sought to promote the full use of radio facilities in the public interest by having them assigned as promptly as possible, while at the same time affording to *applicants* the maximum protection against unwarranted denials of license" and "no right of hearing is conferred upon any person other than an applicant." (Petitioner's Brief pp. 18, 19.)

This argument proves too much. Section 309(a) does not cover all applicants. It covers only applicants for *license* or *renewal of license* or *modification of license*. Its careful language must be read in conjunction with Section 319(a) which expressly forbids the issuance of any *license* unless a construction permit has first been granted by the Commission after a finding that public interest, convenience and necessity will be served thereby. Not until after he has been granted a construction permit and has completed the construction of his station in accordance therewith does a person become eligible to file such an application as those

specified in Section 309(a). At that point, he becomes not only eligible to apply for a license but entitled to receive one.

Had it been the Congressional purpose, as asserted at page 18 of Petitioner's Brief, to afford *applicants* the maximum protection against unwarranted denials of their applications to operate radio equipment, clearly Congress would not have neglected the applicant for construction permit. That such was not the Congressional purpose is established by the particularity by which the section is limited to those applicants who, like this Respondent, have previously acquired a statutory status and statutory rights. Thus properly construed, Section 309(a) is not in conflict with Sections 303(f) and 312(b) but in support of them.

Respondent does not deny that Matheson Radio Company, was, in fact, an applicant for modification of license and therefore entitled to a hearing under Section 309(a). Respondent does deny that Sec. 309(a) either in terms or under any reasonable construction sustains the Commission's position that KOA was not entitled to a hearing. On the contrary, we submit that Respondent was entitled to a hearing in this case under two specific provisions of the Statute, Secs. 303(f) and 312(b); that these sections are consistent with Sec. 402(e) and that all three sustain Respondent's interpretation of Sec. 309(a).

Section 303 (f)

This section of the Act deals specifically with the power of the Commission to make regulations. It prohibits regulations which make "changes in the frequencies, authorized power, or in the times of operation of any station" without the consent of the licensee unless "after a public hearing" the Commission shall determine that public interest will be served thereby. In this case, the Commission could not have granted the WHDH application without amending its Rule 3.25 by changing KOA's frequency from one channel classification to another.

Under the Commission's interpretation (Petitioner's Brief, p. 29), KOA would have been entitled to a hearing under Sec. 303(f) had it been changed from one exclusive channel to another even though no curtailment of service and no injury to KOA resulted from the change. In fact, by coincidence, just such a change was made in KOA's frequency assignment immediately prior to the Commission's final action of April 7, 1941, in order that the adjustments necessitated by the North American Regional Broadcasting Agreement could be made. No injury to KOA resulted, it sought no hearing and it took no appeal. The incident does serve to illustrate, however, the anomalous results which follow acceptance of the Commission's interpretation of this section.

The version of Section 303(f) for which the Commission contends is wholly at variance with the statutory scheme of the Act as construed by this Court. It is not possible to enforce the standards established by the Congress "upon hearing and evidence" or to consider the rights and equities of appellant "in relation to the total situation of which they are a part" and at the same time give to Section 303(f) the meaning for which the Commission contends (*Schechter Corporation* v. *United States*, 295 U. S. 495; *Yankee Network Company* v. *Federal Communications Commission*, 71 Appeals D. C. 11, 16, 107 Fed. (2d) 212, 217).

Nothing in the Act supports the belief that Congress intended to give a hearing to persons who are not injured while denying a hearing to those who are. KOA was injured by Commission action changing its frequency from I-A to I-B and was therefore entitled to hearing under Section 303(f) even under a literal interpretation of the Section. When this and other related provisions of the Act are considered in the light of the purposes of the Act in its entirety, there can be no doubt that Congress intended to and did prohibit the type of action taken here (*Federal Trade Commission* v. *Raladam Company*, 283 U. S. 643, 650; *Humphrey's Executor* v. *United States*, 295 U. S. 602, 605), and the court below so found.

Section 312(b)

Section 312(b) of the Act requires the Commission to grant a licensee a hearing before his license is revoked or modified. This section deals with the power of the Commission not with respect to the making of regulations, but in the exercise of its quasi-judicial function in selecting among applicants. In this case, it has relation not to the Commission's action in amending Rule 3.25 but to its action granting the WHDH application after the Rule was modified.

The Commission defends its refusal of any hearing under Section 312(b) by saying that its order granting the WHDH application did not require KOA to make any change in the operation of its transmitter; and that since the KOA license merely authorizes the operation of a described transmitter during the hours and in the manner specified, Respondent does not qualify as one whose license has been modified under Section 312(b) (Petitioner's Brief, pp. 29-33).

This construction of Section 312(b) denies to a licensee any rights beyond his transmitting antenna. It means that though a licensee may be authorized to broadcast, he is not authorized to broadcast to anybody. And since the transmission of interference-free signals by the broadcaster is the correlative of the reception of interference-free signals by the public, it necessarily ascribes to Congress a purpose utterly foreign to every other provision of the Act and every decision rendered under it.

Nor can the Commission qualify its interpretation of Section 312(b) by asserting that in this case, the resulting interference is "slight". If KOA has no rights to be heard before another station is authorized to cause interference to its service, then the Commission is not restricted to the action it took at Boston. It may, and on January 20, 1942 it did, authorize a station at Cleveland to operate on 850 kilocycles without hearing (*In re WJW, Inc.*, ———

FCC ——— Decided January 20, 1942, not yet reported.) If the Commission has such power at all, it has the power utterly to destroy KOA's service without ever granting Respondent a hearing.

We submit, and at least two members of the Court below found, that the Commission's action of April 7, 1941 constituted a modification of KOA's license within the terms of Section 312(b) of that Act.[5]

Section 402(e)

Although this section of the Act does not purport, independently of Secs. 303(f) and 312(b) to confer any right to hearing upon Respondent, it clearly supports the view that a hearing should have been granted. It provides:

> "At the earliest convenient time *the court shall hear and determine the appeal upon the record before it*, and shall have power, *upon such record*, to enter a judgment affirming or reversing the decision of the Commission, * * * *PROVIDED, HOWEVER, That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive* unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to

[5] Petitioner's Brief at p. 37, seems to suggest that (a) this concept of a license would be permissible only if the Commission had adopted regulations establishing areas or zones to be served under Sec. 303(h); and (b) in that event Respondent would be worse off since Sec. 303(h) does not specifically provide for hearing while Sec. 303(f) does.

There are two answers to such a contention. On the one hand, Respondent is entitled to hearing under Sec. 312(b) before its license is modified whether that modification be accomplished by a change on the face of the license or by a change in the Regulations incorporated by reference in the license and this irrespective of the section of the Act from which the authority for the regulations is derived. On the other hand, both Sec. 303(f) and 303(h) are subject to the paramount requirement that regulations under them shall be "not inconsistent with law"—i. e., consistent with due process.

review by the Supreme Court of the United States upon writ of certiorari on petition therefor under Section 240 of the Judicial Code as amended, by appellant, by the Commission, or by any interested party intervening in the appeal."

Where a statute contains such provisions, it is doubly important that parties affected should be afforded an adequate hearing. This court has clearly so held in *Morgan* v. *United States*, 298 U. S. 468, and *Morgan* v. *United States*, 304 U. S. 1.

Even the limited right of judicial review prescribed by this statute is not open until one has exhausted his administrative remedies and exhaustion of remedies presupposes the existence of such remedies. (See *Red River Broadcasting Company* v. *Federal Communications Commission*, 69 Appeals D. C. 1, 98 Fed. (2d) 282, Cert. Denied 305 U. S. 625.)

THE REQUIREMENTS OF DUE PROCESS.

The question of right to be heard presented in this case goes to the very heart of the administrative process. If, as the Commission contends, proceedings before it are to be patterned solely along lines dictated by its own convenience with no regard for interests or legal rights, then indeed the power of administrative bodies is absolute. But such a theory presupposes in the Commission non-existent powers and also requires an interpretation of the statute which is both unwarranted and in violation of the due process clause of the Fifth Amendment of the Constitution.

The power to make regulations which has been conferred by Congress upon executive or administrative officers from the very outset of our government is not for the purpose of governing their departments but for the purpose of administering the laws which do govern (*United States* v. *Grimaud*, 220 U. S. 506, 517). Such regulations become binding rules of conduct only as subordinate rules and when found to be within the framework of the policy which the Congress has sufficiently defined (*Panama Refining Com-*

pany v. *Ryan*, 293 U. S. 388, 429). Moreover, all enactments of a legislative character, whether by Congress or by executive or administrative officers, are subject to the implied limitation of consistency with due process (*Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, 123; *United States* v. *Katz*, 271 U. S. 354, 357).

Both in the case of *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Company*, 289 U. S. 266, and the case of *Schechter Corporation* v. *United States*, 295 U. S. 495, this Court interpreted the Commission's power to grant licenses as a limited power. In the *Nelson Brothers* case, this Court said:

> "Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond; *whether its proceedings satisfy the pertinent demands of due process*, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial review."

In the *Schecter* case, the court dealt not only with the required factual basis for Commission action, but with procedural requirements as well. Discussing the Federal Communications Commission this Court said:

> "These standards established by Congress were to be enforced upon hearing and evidence, by an administrative body acting under statutory restrictions adapted to the particular activity."

And more recently in *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U. S. 134, this Court said:

> "to be sure, the laws under which these (administrative) agencies operate prescribe the fundamentals of fair play, they require that interested parties be afforded an opportunity for hearing."

In the case of *Yankee Network Company* v. *Federal Communications Commission*, 71 App. D. C. 11, 16, 107 Fed. (2) 212, 217, the United States Court of Appeals for the District of Columbia pointed out that the rights of a licensee are created under the Act by the granting of a license pursuant to the Act, and that such rights are therefore statutory in character and beyond the Commission's power to control; that such rights are neither created nor limited by the Commission's rules governing intervention or other matters of procedure; and that the use of such procedural devices as a petition for intervention is not for the purpose of creating rights but only for the purpose of protecting existing rights. The Court further stated that:

> "equities and rights do not exist in a vacuum but in relation to the total situation of which they are a part."

This is only another way of stating that in any given case the Commission must not only consider the rights, duties and obligations of the applicant and the result to him of any action taken, but must also consider the rights, duties and obligations of existing licensees under the Act and the result to them of any action taken.

And the same court in the case of *Red River Broadcasting Company* v. *Federal Communications Commission*, 69 App. D. C. 1, 98 Fed. (2d) 282, dealt at length with the procedural scheme of the Act and the assertion of rights and the use of remedies by licensees under the Act. It was there stated to be the intention of Congress in formulating the Act to require persons who felt themselves aggrieved by action of the Commission to acquaint the Commission with the nature of their claims and attempt to assert their rights before the Commission prior to the time that anticipated action was taken. It was pointed out that vigilance and the exercise of reasonable care upon the part of such persons was not only necessary for proper administrative action, but for proper judicial review of such action. The very section of the Act upon which the Commis-

sion principally relies (Section 4 (j)) was construed as permitting, if not requiring, interested persons to appear before the Commission and be heard concerning any subject in which they later claim or assert an appealable interest.

In this case, the Commission was required to find as a condition precedent to the granting of the WHDH application that such action would comply with the statutory standard. A finding of this character involves more than the exercise of executive discretion or an ordinary executive determination. Such a finding involves a determination of a judicial nature where rights are dependent upon facts and where those facts must be interpreted in the light of statutory provisions. A determination of this character can validly be made only where parties substantially affected thereby are afforded an opportunity for hearing with all that that term implies (*Morgan v. United States*, 298 U. S. 468, 480, 481; *Morgan* v. *United States*, 304 U. S. 1, 19-20). It is no answer to say, as the Commission does, that it was more convenient for the Commission to proceed otherwise. Nor does it afford an answer to say that the Commission itself is the best judge of when a party should be permitted to intervene in proceedings before it to the end that such proceedings will be promptly concluded. The requirement that hearings precede orders that "impinge upon legal rights" has its origin in constitutional requirements of due process. There can be no compromise with this requirement on grounds of expediency or a desire to be rid of harrassing delay (*Norwegian Nitrogen Company* v. *United States*, 288 U. S. 294; *Ohio Bell Telephone Company* v. *Commission*, 301 U. S. 292, 304).

The Commission has construed Sec. 309(a) of the Act wholly without regard to these fundamental requirements. It deduces from the failure of 309(a) to make specific reference to parties other than applicants an intention on the part of Congress to disregard them. Congress could not validly have done so, even if it had so intended. That it did not intend so to do is amply demonstrated not only by the

Act in its entirety but by the construction which this and other courts have placed upon the Act. Section 309(a) like every other legislative enactment must be constructed in the light of the requirements of due process. Independent of all other errors, the Commission's failure so to construe and apply Sec. 309(a) vitiates the action taken in this case.

C. The Commission Erred in Denying Respondent's Petition for Rehearing.

On April 25, 1941, after the Commission had adopted its final Order, Respondent, acting under the provisions of Section 405 of the Act (48 Stat. 1095; U. S. C. title 47, Sec. 405) filed a Petition for Rehearing in which administrative relief was sought from the errors which had been committed. All errors relied upon in this Court were brought to the attention of the Commission in this petition save one which had not then occurred—the denial of the Petition for Rehearing itself. This occurred on May 20, 1941. (R. 85)

In its petition, Respondent requested that the Commission reconsider its action of April 7, 1941, amending its Rules and granting the applicattion of WHDH and that it then do one of two things. Either that it enter its order denying the WHDH application upon the basis of the proceedings already had, or that it conduct such further proceedings upon that application as would be consistent with law and with its own rules and regulations. Whatever may have been Respondent's right to have the WHDH application denied on the basis of the proceedings already had (and we concede that the granting of this relief was a matter resting in the discretion of the Commission), we submit that the second alternative, namely, that the Commission take such further action upon the application as is consistent with law and with its own procedural requirements represented the minimum to which Respondent was then and is now entitled.

When Congress enacted Section 405 of the Act, it provided a method for curing errors in administrative proceedings without recourse to the courts. To this end, it made the opportunity for administrative relief under Section 405 at least coextensive with that for judicial relief under Section 402 of the Act.[6]

In denying this petition, the Commission submitted a voluminous opinion which appears in the record (R. 63-85). For present purposes that opinion can be summarized as an assertion that the Commission either had considered or was not required to consider all points made in the petition. The Commission dismissed Respondent's plea for a hearing with the statement that "Section 309(a) of the Act requires the Commission to grant applications without hearing, if upon examination thereof it shall determine that the public interest, convenience or necessity will be served by the granting thereof" and the further statement that "no duty rests upon the Commission to afford any person *other than the applicant* an opportunity to be heard". It further asserted that the application upon which the proceedings before the Commission had been had was not defective; that the Commission had not determined matters of policy as a result of the hearing held before the Examiner contrary to Section 409(a) of the Act; and explained to its own satisfaction other deficiencies in the record upon which the action was taken. Having reached the conclusion that the Respondent was not entitled to be heard and the applicant having expressed no dissatisfaction with the result reached, the Commission found no difficulty in explaining the action taken and in disposing of Respondent's contentions.

All that has been said concerning the action of the Commission in denying Respondent's Petitions for Interven-

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[6] *Red River Broadcasting Company* v. *Federal Communications Commission*, 69 Appeals D. C. 1, 98 Fed. (2d) 282.

tion applies with even greater force to the ruling on the Petition for Rehearing. The same errors which were committed in these earlier rulings were repeated and reemphasized here; moreover, this action was taken in the face of a statutory provision which seems to have anticipated the situation in which Respondent found itself when the Commission made its order final without Respondent's participation. But notwithstanding the fact that the Commission was construing and applying a statutory enactment and one which had been construed as making provision for "complete relief for one in the position of the appellant" (*Red River Broadcasting Company* v. *Federal Communications Commission*, *Supra*), we find the Commission applying the same considerations which governed it in construing and applying its own rules to exclude Respondent from the administrative proceedings. These considerations have already been shown to be both contrary to the statutory scheme and violative of due process in their earlier application. They are more clearly so here.

Conceding that the Commission's action upon a petition for rehearing is governed by the exercise of its discretion, that discretion must be a sound and legal discretion and one which must be exercised in the light of the allegations made. The task of curing administrative errors is not a wholly unilateral one, but one in which the Commission as well as parties appearing before it must engage. In this case, the action of the Commission in denying Respondent's Petition for Rehearing was not only an abuse of discretion which amounts to reversible error—it was more than that. It was the last in a series of events which made the order granting the WHDH application entirely void as a denial of due process.

D. The Commission's Action Was Arbitrary, Capricious and Illegal.

Apart from the errors committed and already discussed, the Commission's action is void for other reasons.

1. *The Commission Unlawfully Ignored Its Rules 1.71 and 1.72.*

When the WHDH application was first received at the Commission on October 25, 1938, it was defective in substance and could not have been granted under Sec. 116 (now Secs. 3.22 and 3.25) of the Commission's Rules. (*Crosley Corporation* v. *Federal Communications Commission*, 70 App. D. C. 312, 106 Fed. (2d) 833; *Pittsburgh Radio Supply House* v. *Federal Communications Commission*, 69 App. D. C. 22, 98 Fed. (2d) 303). Notwithstanding this and the further fact that the Rules of the Commission then made no provision for such action, the Commission on January 3, 1939, designated the application for hearing, without at that time issuing a Notice of Hearing.

On August 1, 1939, the Commission's present Rules 1.71 and 1.72 became effective replacing similar rules theretofore in effect (R. 20, 21). Rule 1.71 provides that the Commission will not consider, but will return to the applicant without action, any application not filed in accordance with its Rules. Rule 1.72 requires that a formal Petition be filed if the applicant desires a modification of any rule or regulation (App. 48). The WHDH application thus was not only defective in substance and subject to rejection by the Commission under Rule 1.72 (because in conflict with Secs. 3.22 and 3.25) but it also became defective under the terms of Sec. 1.71. This followed from the fact that the applicant at no time had filed any petition requesting an amendment of Secs. 3.22 and 3.25 as required by Sec. 1.71. Notwithstanding these facts, the Commission on September 2, 1939, issued a Notice of Hearing and indicated that it intended to proceed upon the application by specifying October 10, 1939, as the date for hearing thereon. Con-

fronted with this situation, Respondent on September 29, 1939, filed a motion to dismiss the application and requested the Commission to invoke the requirements of its own Rules (Sec. 1.72) by returning the application to the applicant (R. 20).

On December 2, 1939, the Commission issued its second Notice of Hearing to replace that issued on September 2. As has been heretofore pointed out, in this second notice the issue concerning modification of Secs. 3.22 and 3.25 of the Commission's Rules was eliminated and the only issue pertaining to these Rules was one to determine whether or not "when properly construed and applied" they precluded the granting of the WHDH application. On September 5, 1939, following the issuance of the second Notice, Respondent's motion was dismissed (R. 26) and the Commission finally determined to proceed on the basis of the WHDH application as originally filed.

The reasons for this action are unexplained in the record but only two explanations are possible. The first is that the Commission having on October 10, 1939, decided that Respondent was not entitled to participate in the proceedings upon the WHDH application also decided that it had no standing to present a motion to dismiss the application. The second is that while the Commission hesitated to violate two of its procedural rules, it had no such reluctance at the violation of one. In other words, having determined in its second notice of hearing to eliminate any issue concerning the modification of its rules, the Commission felt free to proceed with the application notwithstanding the requirements of Sec. 1.72 and notwithstanding the further fact that under Secs. 3.22 and 3.25 it had no power to grant the application. But whatever the reasons for this action were, the entire course of the proceedings was altered. As the result of its election to proceed in a manner inconsistent with its own procedural requirements with an application which could not have been granted under its substantive rules, the Commission adopted a course of action which not only made possible but in fact invited the ultimate error.

Events at the hearing show that not only the examiner who heard the case but counsel for all parties who were permitted to participate believed and proceeded upon the theory that the case was to be presented and decided upon the basis of Secs. 3.22 and 3.25 as they then stood; that no question of the modification of these rules was or could be presented. Counsel for the applicant expressly disavowed any intention of requesting a modification of the Commission's Rules. (R. as cert. 183-186) The examiner limited the evidence to the issue specified by the Commission and in so doing, stated that no question of policy or modification of the Commission's Rules was open for consideration or decision. (R. as cert. 183) As a result of this the record made was clearly inappropriate for the determination of any question concerning the modification of the Commission's Rules and even more clearly inappropriate for any action upon the application in the event that the Rules were modified.

When the matter came before the Commission for consideration, three of its five members present and participating elected not to be bound by the issues which the full Commission had specified. What the majority attempted to do was to reach what they considered to be the desired result. Finding both the rules and the proceedings had under those Rules to be inconsistent with this result, they proposed to amend the Rules to conform to that result and disregarded the proceedings had. The action taken amounted to an amendment of the Commission's Rules to conform to the WHDH application followed by a grant of that application with a hearing. This we submit the Commission had no power to do and demonstrates a complete lack of regard for the requirements of quasi-judicial procedure.

We are not unmindful of the fact that in the absence of statutory provisions to the contrary and under proper issues an administrative tribunal may combine in a single proceeding an exercise of quasi-legislative and quasi-judicial functions and promulgate an order having a dual aspect

such as is contemplated by Sec. 1.71 of the Commission's Rules (*Arizona Grocery Co.* v. *Atchison Railway*, 284 U. S. 370). But what the Commission attempted to do here is vastly different. By strange and unprecedented admixture of the judicial and legislative it has attempted to base its order upon a proposal and upon issues concerning which none, including the applicant, had any notice and upon a record which affords no factual basis for the action taken. Having attempted by its first notice to institute a proceeding having a dual aspect, it then altered its procedure to limit the issues solely to ones judicial in nature. After the building of a record on this single issue, the Commission, then undertook to make its decision not upon that issue but upon issues which had been discarded.

We cannot better characterize or describe the action of the majority of the Commission than have Commissioners Case and Craven who dissented from such action and in dissenting said (R. 51):

> "This application was filed and prosecuted in violation of a rule of this Commission promulgated after a general hearing in which the whole industry, including this applicant, was represented. Other licensees of this Commission who applied were denied the right to intervene in the hearing of this particular case. No petition was filed by this applicant to waive or modify the rule for this particular application. In the final order the Commission, on its own motion and without notice to the industry and disregarding its determination of the general policy as promulgated in the rules adopted, has taken the unprecedented action so far as this Commission is concerned of changing a rule in this particular case to allow the granting of this application which was theretofore in violation of the rule.
>
> "This invites other applicants to file applications in violation of and without regard to the rules of this Commission. It discriminates against those who have relied upon the rules of the Commission and not filed applications for frequencies which they might desire, and which the rules of the Commission did not permit them to have. This discrimination is inequitable and not in accordance with the best administrative or judicial practices."

2. The Commission Unlawfully Ignored Section 409(a) of the Act.

Moreover, the Commission's action in this case was a clear violation of Section 409(a) of the Act. Section 409(a) confers upon the Commission the power to hold hearings, issue and sign subpoenas, administer oaths, examine witnesses and receive evidence at any place in the United States designated by the Commission (App. p. 49). It further provides that this may be done by any member of the Commission, an Examiner of the Commission, or any Director of any Division when duly designated by the Commission for such purpose "except that in the administration of Title III an Examiner may not be authorized to exercise such powers with respect to a matter involving (1) a change in policy by the Commission, * * * or (4) a new kind of use of frequencies."

Since the reallocation of 1928, the KOA frequency had been classed as one upon which no nighttime operation except KOA's would be permitted. This classification had been established first by the Federal Radio Commission, and had been retained through subsequent allocation orders. The reasons which prompted the establishment and maintenance of this status for this frequency are dealt with extensively in the opinion of the minority of the Commission (R. 42-45), and need not be restated here. These decisions and the considerations which prompted them were clearly ones of policy which determined the use to be made of these frequencies, and they were reflected in Rules and Regulations of the Commission which have the force and effect of law (*Pittsburgh Radio Supply House* v. *Federal Communications Commission*, 69 App. D. C. 22, 98 F. (2d) 303, *Crosley Corporation* v. *Federal Communications Commission*, 70 App. D. C. 312, 106 F. (2d) 833.

Nor can there be doubt concerning the scope of the prohibitions contained in Section 409 (a) of the Act. They clearly restrict the activities of examiners, and the right of the Commission to delegate certain activities to examiners,

in all cases involving broadcasting where considerations of basic policy are involved. They not only prevent examiners from attempting to formulate Commission policies in such cases, but they also prevent examiners from formulating a record upon which such policies are ultimately to be determined. This much is clear from a reading of the Act and the legislative history of this section makes the reasons for these prohibitions apparent.

Section 409 of the Act had its origin in the provisions of H. R. 7716 which passed both Houses of the Seventy-second Congress but failed to become law for lack of Presidential approval. Throughout all proceedings upon this measure before the Senate and the Senate Committee on Interstate Commerce dissatisfaction was shown with the manner in which the Federal Radio Commission was then handling broadcast cases. This dissatisfaction arose out of the practice of that Commission of delegating to examiners the conduct of cases and the making of recommendations where matters of policy were involved. There resulted first an amendment which would have prohibited examiners from hearing any cases, and later a relaxation of that prohibition to restrict the activities of examiners substantially as at present.[7] In its final report to the Senate on this measure

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[7] As H. R. 7716 passed the House, it permitted the Commission to delegate hearings in all matters to examiners or other members (See Report of Hearings Before Senate Committee on Interstate Commerce, 72nd Congress, First Session, Part I, p. 2). As amended, and recommitted to the Committee on December 8, 1932, with a report (Senate Report No. 1104, 72nd Congress, 2nd Session, p. 2), the bill permitted the hearing of cases only by "any member or members of the Commission when duly designated by the Commission for such purpose". As subsequently amended, and passed by the Senate, it provided "that the Commission may authorize examiners to hold hearings and exercise all of the powers herein granted the Commission in connection with holding hearings in cases not involving a change in policy by the Commission, a transfer of the use of radio facilities from one zone to another, a change of regulations, new devices or developments in radio, or a new kind of use of frequencies" (Senate Report No. 1945, 72nd Congress, 2nd Session, p. 2). This language was agreed to in the Conference Report (House Report No. 2106, 72nd Congress, 2nd Session).

(Senate Report No. 1945, 72nd Congress, Second Session, p. 9) the Committee explained the draft finally agreed upon by stating "your Committee believes it more desirable that the Commission should hold all important hearings and secure more personal knowledge of contests by this method, and for that reason has provided that all hearings on major radio questions shall be held by the Commission, or by a Commissioner, or a number of Commissioners, as the Commission may designate."

An amendment to the Commission's allocation rules clearly comes within both the letter and the spirit of the prohibition contained in Section 409 (a). This case is an eloquent illustration of the fact that the apprehensions felt by members of Congress were justified.[8]

See Also Senate Report 781 to accompany S. 3285, 73d Congress, 2nd Session.

"Section 409 Relates to proceedings before the Commission. The Section is largely based upon Sections 12, 17(1), 18, 19 and 20(10) of the Interstate Commerce Act. Examiners and Directors, as well as members of the Commission, are authorized to conduct hearings, administer oaths, and issue subpoenas, but the provisions of H. R. 7716 referred to above, are adopted in part, restricting an examiner from hearing certain cases involving policy, the revocation of a station license, or new developments in radio."

[8] In the hearings before the Senate Committee on this measure after its resubmission to the Committee on December 8, 1932 (Report of Hearings Before Senate Committee on Interstate Commerce, 72nd Congress, First Session, Part II, pp. 58-59) Senator Dill stated his position and that of the Committee as follows:

"*Senator Dill.* I do think that the record shows that the Commission has not been doing the work that the law intended it should do, namely, that it has not been going into these important cases itself except to sit down and read the record, which, I think is a failure to do its duty; and my purpose in proposing to strike out the examiners is to try to have this Commission become an investigating body and the body that will know all about radio, instead of delegating its duties in that regard to inexperienced lawyers who come before it and start the work and gradually become informed on the questions involved and became in effect, the Commission. It is a policy that was never contemplated when this law was written:

Moreover, it is significant here that in the initial stages of this case the Commission itself appears to have construed Section 409 (a) as prohibiting an examiner from conducting a hearing where the outcome might be the amendment of a regulation which governed the use of a frequency. When as a result of its first Notice of Hearing dated September 2, 1939, the Commission specified as one of the issues a possible modification of Sections 3.22 and 3.25 of its Rules, Commissioner Case was designated to hold the hearing. In the second Notice of Hearing dated December 2, 1939, when the Commission removed any issue concerning modification of its Regulations, it then relieved Commissioner Case of this assignment and assigned the matter to an examiner for hearing. These changes in issues and hearing officials were not accidental. They were planned and the plans then made clearly did not contemplate such a result as that finally reached. This is shown by the record of the proceedings before the Examiner, by the dissenting opinion of Commissioners Case and Craven and by the whole course of procedural events.

The plain truth of the matter is that until December 9, 1940, (the date of the issuance of the Proposed Findings and Conclusions) the Commission intended to conduct its proceedings in a manner consistent with Section 409 (a) of the Act. On that day, three of the five members of the Commission who were present and participating, either purposely or inadvertently ignored the requirements of this section. Notwithstanding the fact that this error was brought to the Commission's attention in the Petition to

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and I want to get it before Congress to see whether Congress desires to continue that sort of thing. If so, then I am in favor of abolishing most of the Commission. That is my view of it. * * * Every man who ever sits in a hearing knows the difference in the information he gets about the case being heard when he sits there and participates and is actually in it, as compared with when he sits down and reads the cold record when all the personalities and the surroundings of a hearing are removed."

Intervene filed by respondent on December 16, 1940 (R. 46) and again in Respondent's Petition for Rehearing filed April 25, 1941 (R. 52), the Commission made its proposal of December 9, 1940, final and re-affirmed this action. This is a plain violation of Section 409 (a) which renders entirely void all action taken by the Commission on the record made before Examiner Hyde. The Commission was without power under the statute to amend its Rules as a result of a hearing before an examiner and without such an amendment it was without power to grant the WHDH application.

(3) *The Commission Unlawfully Ignored Section 307(b) of the Act and the North American Agreement.*

Before it may grant any instrument authorizing the construction or operation of a station under the Statute, the Commission must find that public interest, convenience or necessity will be served thereby. It was not until the Commission denied Respondent's Petition for Rehearing (R. 63) that it discussed either Section 307(b) of the Act or the North American Regional Broadcasting Agreement.

Then it said it had found that the improvement and extension of service in the Boston area in and of itself would serve public interest (R. 85). Elsewhere in its decision on the Rehearing Petition, the Commission asserts that Respondent was not entitled to a hearing on the North American Agreement because "This contention is based upon (Respondent's) misconception that it is in some manner subrogated to the rights of the United States under the Treaty".

Obviously, neither Section 307(b) nor the North American Agreement confers upon Respondent any right to hearing. But, being entitled to a hearing under other sections of the Act, and being entitled on appeal to raise any relevant question of law in respect of the Order of the Commission, Respondent may show that in granting the WHDH application, the Commission disregarded the public interest both nationally and internationally.

Section 307(b) of the Act requires the Commission to make and maintain a "fair, efficient and equitable distribution" of radio facilities. As between KOA and WHDH in this case, the section requires comparative showings of the service available and the service to be rendered both in the area gained by WHDH and the area lost to KOA. The Commission made no findings of this sort and the record is barren of any evidence bearing upon the subject.

Under the North American Regional Broadcasting Agreement, the Commission undoubtedly has wide discretion. But its discretion must be exercised within the statutory standard and the Commission must weigh the result of its action on the WHDH application upon the interests of listeners in the United States.

The Commission was required to consider, and Respondent was entitled under the Statute and under the Fifth Amendment to be heard, on both subjects. The Commission's refusal to do the one and to allow the other is reversible error.

E. The Commission's Assertion that Respondent Has Had Sufficient Relief.

The Commission has advanced the novel proposition that since, in its view, Respondent's interest was "slight" only a a modicum of participation was required to satisfy the terms of the statute and the requirements of due process. It suggests that since Respondent filed a brief and presented argument *amicus curiae* and was *permitted* to file a petition for rehearing, it cannot complain. Moreover, it is urged that had Respondent taken advantage of Rule 1.195 it could have achieved its purposes.

In depriving Respondent of its right to be heard, the Commission on its own motion suggested that Respondent file a brief *amicus curiae*. In anticipation of the sort of contention made here, Respondent participated as *amicus curiae* in this proceeding under definite reservation as to its rights

as a party. The following statement appears on page 1 of the Brief filed by Respondent on January 27, 1941:

> "It would be patently inappropriate, in a Brief filed under such circumstances, to devote space to reassertions of NBC's belief that it has been at all times, both a proper and a necessary party to this proceeding. It does request specifically, however, that its action in appearing *amicus curiae* be not construed as a waiver or abandonment of any of the rights which it may have had to participate fully throughout the hearing upon the application of Matheson Radio Company, Inc."

The suggestion that Respondent could have adequately protected its rights by availing itself of the procedure specified in Rule 1.195 can hardly be taken seriously. Section 1.195 of the Commission's Rules shows on its face that the procedure provided for therein was not intended for one in the position of Respondent; moreover, that such procedure, if employed, would not satisfy the requirements of due process. This rule was designed and intended by the Commission as a protection against political pressure. On or about November 10, 1937, when this Rule was first promulgated, Frank R. McNinch, then chairman of the Commission, issued a public statement concerning this rule, which among other things, said:

> "From various sources, I gather the impression that over a period of years there has grown up, like Topsy, the practice of making suggestions, requests or recommendations to members of the Commission or its staff as to matters pending by those not of record as parties in interest; and also by parties in interest, or their attorneys, after the record in a case has been closed but before action by the Commission. This has been the basis for a part of the criticism as to political or outside influence aimed at the Commission, and I think it should be said in all fairness that, whatever may have been the responsibility of the Commission and staff in this respect, such responsibility also rests in part on any who may have made such suggestions to or requests of any Commissioner or staff member."

"* * * To all who desire that the Commission conduct its affairs in a manner that will best serve the interests of the public and reflect credit upon the Commission and Congress, frank appeal is made for support of the Commission in carrying out the purposes to be effected by the Orders hereinafter referred to."

CONCLUSION.

The decision of the court below reversing the Commission should be affirmed.

Respectfully submitted,

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March 7, 1943.

APPENDIX.

COMMISSION'S RULES AND REGULATIONS.

Section 1.71:

"Applications made on prescribed forms, exceptions.—Each application for an instrument of authorization shall comply with the Commission's Rules and Regulations and shall be made in writing, subscribed and verified as provided in section 1.121, on a form furnished by or in the manner prescribed by the Commission * * *; PROVIDED HOWEVER, that in cases where an applicant desires a modification of a rule or regulation, he shall submit a formal petition setting forth the desired change and the reasons in support thereof. The required forms may be obtained from the Commission or from any of its field offices. (For a list of such offices and related geographical districts, see appendix No. 3)

Section 1.72:

"Defective applications.—(a) Applications which are defective with respect to completeness of answers to required questions, execution, or other matters of a purely formal character will not be received for filing by the Commission unless the Commission shall otherwise direct.

(b) Applications which have been received for filing but which are not in accordance with the Commission's rules, regulations or other requirements will be considered defective. If an applicant by specific request of the Commission is required to file any documents or information not included in the prescribed application form, a failure to comply therewith will constitute a defect in the application. Such defective applications will not be considered by the Commission."

COMMUNICATIONS ACT OF 1934.

Section 405:

"After a decision, order, or requirement has been made by the Commission in any proceeding, any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall

be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear: PROVIDED, HOWEVER, That in the case of a decision, order, or requirement made under title III, the time within which application for rehearing may be made shall be limited to twenty days after the effective date thereof, and such application may be made by any party or any person aggrieved or whose interests are adversely affected thereby. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted, the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination, shall be subject to the same provisions as an original order."

Section 409 (a):

"Any member or examiner of the Commission, or the director of any division, when duly designated by the Commission for such purpose, may hold hearings, sign and issue subpenas, administer oaths, examine witnesses, and receive evidence at any place in the United States designated by the Commission; except that in the administration of title III an examiner may not be authorized to exercise such powers with respect to a Matter involving (1) a change of policy by the Commission, (2) the revocation of a station license, (3) new devices or developments in radio, or (4) a new kind of use of frequencies. In all cases heard by an examiner the Commission shall hear oral arguments on request of either party."

NORTH AMERICAN REGIONAL BROADCASTING AGREEMENT.

Par. B, 8(d) of Part II:

"(d) If within the period of this Agreement the country to which a clear channel has been assigned shall have made use of the channel but not in the manner above prescribed or not to the extent required by the provisions of this Agreement, such country shall be considered as having relinquished that portion of the rights which it has not used and at the expiration of this agreement, the other countries party thereto shall have the right, if they see fit, to withdraw the unused privileges from such country and to reassign them to any or all of the other interested countries."

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SUPREME COURT OF THE UNITED STATES.

No. 585.—October Term, 1942.

Federal Communications Commission, Petitioner, *vs.* National Broadcasting Company, Inc., (KOA), et al.	On Writ of Certiorari to the United States Court of Appeals, District of Columbia.

[May 17, 1943.]

Mr. Justice Roberts delivered the opinion of the Court.

This case presents important questions of procedure arising under Title III of the Communications Act of 1934.[1]

The respondent is licensed to operate station KOA at Denver, Colorado, on a frequency of 850 kilocycles. Station WHDH, of Boston, Massachusetts, had a license to operate, daytime only, on the same frequency. October 25, 1938, WHDH applied to the Communications Commission for an increase in power and for operation unlimited in time. The Commission set down the application and designated certain issues for hearing, of which the following are pertinent: To determine whether the interests of any other stations may be adversely affected by reason of interference, particularly KOA and other named stations; to determine whether public interest, convenience or necessity would be served by modifying the rules governing standard broadcast stations to authorize the proposed operation of WHDH.

The Commission's rules precluded the operation of a second station at night on KOA's frequency;[2] provided that an application not filed in accordance with its regulations would be deemed defective, would not be considered, and would be returned to the applicant;[3] and also that if an applicant desired to challenge the validity or wisdom of any rule or regulation he must submit a petition setting forth the desired change and the reasons in support thereof.[4]

[1] Act of June 19, 1934, c. 652, 48 Stat. 1064, 1081; 47 U. S. C. Sec. 301 ff.
[2] Secs. 3.22 and 3.25.
[3] Sec. 1.72.
[4] Sec. 1.71.

The respondent petitioned to intervene. Its petition was denied. It then moved to dismiss WHDH's application for failure to conform to the rules and regulations. The motion was denied. Meantime the Commission evidently believing that, in view of the possible alteration of the rules concerning standard broadcast stations, questions of policy might be involved and that, consequently, under Sec. 409(a), the hearing would have to be conducted by a member of the Commission,[5] designated Commissioner Case to conduct the hearing.

No hearing was held under the original notice. A new notice was issued which indicated that the Commission did not then contemplate modification of its substantive rules but intended merely to afford the applicant an opportunity to urge that they be construed in the applicant's favor. Issues specified in the second notice were "to determine whether or not the Commission's Rules Governing Standard Broadcast Stations, particularly Sections 3.22 and 3.25 (Part III) properly interpreted and applied preclude the granting of the application" and to determine the nature, extent, and effect of any interference which would result from a grant of the application, particularly with Station KOA and others named. The inquiry thus limited could be heard before an examiner under Sec. 409(a) and, accordingly, the Commission withdrew the designation of Commissioner Case and assigned an examiner.

A hearing was held January 29 and 30, 1940, but the respondent was not permitted to appear or participate. December 9, 1940, the Commission promulgated proposed findings of fact and conclusions. Two commissioners dissented. All agreed that Secs. 3.22 and 3.25 of the regulations precluded a grant of WHDH's application. Three voted to modify those regulations and to grant the application. Respondent then filed its second petition to intervene, which was denied. The Commission subsequently, on its own motion, permitted respondent to file briefs and present an oral argument *amicus curiae*. April 7, 1941, the Commission adopted a final order amending Sec. 3.25 of the rules and granting the WHDH application, two commissioners dissenting.

Respondent filed a petition for rehearing pursuant to Sec. 405 of the Act.[6] This was denied. Thereupon respondent gave

[5] Sec. 409(a), 47 U. S. C. § 409(a) provides that, in the administration of Tit. III, an examiner may not hold hearings with respect to a matter involving a change of policy by the Commission or a new kind of use of frequencies.

[6] 47 U. S. C. Sec. 405.

notice of appeal to the Court of Appeals of the District of Columbia,[7] which concluded that the Commission's action effected a modification of respondent's license and consequently the statute entitled the respondent to be made a party and to participate in the hearing. The court below therefore reversed the Commission's order and remanded the case for further proceedings.[8]

The respondent contends that it was entitled, as a matter of right, to participate in the hearing before the Commission on the question of the granting of WHDH's application and that its rights in this respect were not satisfied by permitting it to file a brief and present argument. It further insists that the Commission's proceeding was invalid due to the provisions of Sec. 409(a) of the statute, the failure to comply with the rules then in force, and the arbitrary and capricious action taken. Finally, the respondent asserts § 405 entitled it to a rehearing and § 402(b)(2) granted it an appeal.

The petitioner urges the grant of WHDH's application did not amount to a substantial modification of KOA's license or so affect KOA's rights as to require that KOA be permitted to intervene and that, in any event, KOA was not denied any substantial right of participation in the proceeding.

First. We are of opinion that respondent was entitled to be made a party.

Section 312(b) of the Act provides:

"Any station license hereafter granted . . . may be modified by the Commission . . . , if in the judgment of the Commission such action will promote the public interest, convenience, and necessity . . . . *Provided, however,* That no such order of modification shall become final until the holder of such outstanding license . . . shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue."

The Commission found that there would be interference with KOA's broadcast in the eastern part of the United States if WHDH's application were granted. The Commission's own reports to Congress show that at night a small proportion of the urban population and a much larger proportion of the rural population of the country enjoy only such broadcasting service as is afforded by clear channel stations. KOA, one of the stations

[7] Pursuant to Sec. 402(b)(2); 47 U. S. C. Sec. 402(b)(2).
[8] 132 F. 2d 545.

upon which this service depends, has operated continuously at Denver since 1924 and has used a clear channel upon which only one station is permitted to operate during the night. Under the Commission's regulations (§§ 3.22 and 3.25) KOA had, therefore, little or no channel interference from any station located within the United States. In addition, its signals throughout the United States were free, and entitled to remain free, of channel interference from any station in Canada, Mexico or Cuba, pursuant to the provisions of the North American Regional Broadcasting Agreement.[9] The Commission's order deprives KOA of freedom from interference in its night service over a large area lying east of the Mississippi River. Furthermore, the order opens the way for Canada, Mexico, and Cuba, signatories to the broadcasting agreement, to acquire the right to operate stations which may cause channel interference at night on KOA's frequency within the United States.

The respondent urges that it can be shown that the service of WHDH, while interfering at night with that of KOA, would not be a service equally useful, and that the grant to WHDH adds a new primary service to an area already heavily supplied with such service. In its petitions to intervene, the respondent called attention to the terms of its existing license, asserting that the grant of WHDH's application would cause interference in areas where KOA's signal was interference free; that respondent would be aggrieved and its interests adversely affected by a grant of the application and that the operation proposed by WHDH would not be in the interest of public convenience and necessity; that a grant of the application would result in a modification of respondent's license in violation of § 312(b) and would result in a modification of the Commission's regulations without such a hearing as is required by § 303(f) of the Act. In its petition for rehearing the respondent elaborated and reiterated the reasons embodied in its motions for dismissal of the petition and its petitions to intervene.

The Commission says that the section has no application to this case. It asserts that the proceeding was an application by WHDH for modification of its station license and that, under § 309(a) of the Act, the Commission might have acted on the application without any hearing. So much may be conceded, if nothing more were involved. But the grant of WHDH's ap-

[9] 55 Stat., Part 2, 1005.

plication, in the circumstances, necessarily involved the modification of KOA's outstanding license. This petitioner denies, saying KOA's license granted no more than the privilege of operating its station in a prescribed manner and that the grant of WHDH's application in nowise altered the terms of KOA's license. This contention stems from the circumstance that KOA's license authorizes it to operate a transmitter of 50 kilowatts on the frequency 850 kilocycles at Denver. The petitioner says that the grant of WHDH's application affects none of these terms. But we think this too narrow a view. When KOA's license was granted the Commission's rules §§ 3.21 and 3.25 embodied these provisions:

"A 'clear channel' is one on which the dominant station or stations render service over wide areas and which are cleared of objectionable interference within their primary service areas and over all or a substantial portion of their secondary service areas."

"The frequencies in the following tabulation are designated as clear channels and assigned for use by the classes of stations are given:

(a) To each of the channels below there will be assigned one class I station and there may be assigned one or more class II stations operating limited time or daytime only: . . . The power of the class I stations on these channels shall not be less than 50 kilowatts."

850 kilocycles was one of the frequencies appearing on the schedule forming part of the rule.

These rules were incorporated into the terms of KOA's license which granted it a frequency of 850 kilocycles and a power of 50 kilowatts. To alter the rules so as to deprive KOA of what had been assigned to it, and to grant an application which would create interference on the channel given it, was in fact and in substance to modify KOA's license. This being so, § 312(b) requires that it be made a party to the proceeding. We can accord no other meaning to the language of the proviso which requires that the holder of the license which is to be modified must have notice in writing of the proposed action and the grounds therefor and must be given a reasonable opportunity to show cause why an order of modification should not issue. Certainly one who is to be notified of a hearing and to have the right to show cause is not to be considered a stranger to the proceeding but is, by the very provisions of the statute, to be made a party. The very notices issued by the Commission show that that body knew there

would probably be an interference with KOA's signals if the pending application of WHDH were granted; and that the Commission also realized there was a serious question whether the application could be granted under its existing rules. It is not necessary to discuss at any length the sufficiency of the petitions to intervene if, as we have held, the Act itself provided that, in such an instance as the present, KOA was entitled to be brought in as a party. A licensee cannot show cause unless it is afforded opportunity to participate in the hearing, to offer evidence, and to exercise the other rights of a party.

Much is said to the effect that KOA was not in fact injured, because the Commission permitted it to file a brief *amicus curiae* and to present oral argument. It is beside the point to discuss the Commission's rules as to intervention and the privileges accorded by the Commission to one denied intervention since we are of opinion, as already stated, that, under the terms of the Act, the respondent was entitled to participate in the proceedings.

Second. While the Commission did not urge before the court below, and did not advance as a reason for the grant of certiorari, that respondent was not entitled to appeal to the Court of Appeals, this matter was argued here and, as it raises a question of jurisdiction, we shall consider it.

It would be anomalous if one entitled to be heard before the Commission should be denied the right of appeal from an order made without hearing. We think the Act does not preclude such an appeal. Section 402(b)(2) permits an appeal to the Court of Appeals of the District of Columbia by "any . . . person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing" any application for modification of an existing station license. If, within the intent of the statute, the interests of KOA would be adversely affected, or if KOA would be aggrieved by granting the application of WHDH, then the statute grants KOA a right of appeal.

In *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, we dealt with a similar situation. There the question was whether a rival station, which would suffer economic injury by the grant of a license to another station, had standing to appeal under the terms of the Act. We held that it had. We pointed out that while a station license was not a property right, and while the Commission was not bound to give controlling weight to economic injury to an existing station con-

sequent upon the issuance of a license to another station, yet economic injury gave the existing station standing to present questions of public interest and convenience by appeal from the order of the Commission. Here KOA, while not alleging economic injury, does allege that its license ought not to be modified because such action would cause electrical interference which would be detrimental to the public interest.

In view of the fact that § 312(b) grants KOA the right to become a party to the proceedings, we think it plain that it is a party aggrieved, or a party whose interests will be adversely affected by the grant of WHDH's application, as, indeed the Commission seems to have thought when it first noticed WHDH's application for hearing. We, therefore, hold KOA was entitled to appeal from the Commission's action in excluding it from participation in the proceeding and from the order made by the Commission.

The judgment is affirmed.

Mr. Justice BLACK, Mr. Justice MURPHY and Mr. Justice RUTLEDGE took no part in the consideration or decision of this case.

Mr. Justice FRANKFURTER, dissenting.

Unlike courts, which are concerned primarily with the enforcement of private rights although public interests may thereby be implicated, administrative agencies are predominantly concerned with enforcing public rights although private interests may thereby be affected. To no small degree administrative agencies for the enforcement of public rights were established by Congress because more flexible and less traditional procedures were called for than those evolved by the courts. It is therefore essential to the vitality of the administrative process that the procedural powers given to these administrative agencies not be confined within the conventional modes by which business is done in courts.

In my judgment the decision of the Court in this case imposes a hampering restriction upon the functioning of the administrative process. This is the aspect that lends this case importance and leads me to express the reasons for my dissent.

The Communications Act of 1934, 48 Stat. 1064, 47 U. S. C. § 151 *et seq.*, directs the Federal Communications Commission to

"classify radio stations", "prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class", and "assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate". § 303(a)(b)(e). Accordingly, the Commission has established a plan for allocating the available radio facilities among the stations of the country. Under its Rules there are three classes of standard broadcast channels: "clear channels", on which dominant stations render service over extensive areas and which are cleared of objectionable interference within their primary service areas and over all or a substantial part of their secondary service areas; "regional channels", on which several stations serving smaller areas operate simultaneously with powers not in excess of 5 kilowatts; and "local channels", on which many stations serving local areas operate simultaneously with powers not in excess of 250 watts. § 3.21. Similarly, standard broadcast stations are classified into four groups: "class I stations"—dominant stations operating on clear channels and designed to render primary and secondary service over large areas and at relatively long distances; "class II stations"—operating on clear channels and designed to render service over a primary service area which is limited by and subject to such interference as may be received from class I stations; "class III stations"—operating on regional channels and designed to render service primarily to metropolitan districts and the rural areas contiguous thereto; and "class IV stations"—operating on local channels and designed to render service primarily to cities or towns and the suburban and rural areas contiguous thereto. § 3.22. Section 3.25 divides clear channels into two further groups: I-A channels, to which only one class I station is assigned, with one or more class II stations operating limited time or daytime only, and I-B channels, to which both class I and class II stations may be assigned, with more than one station operating at night.

On October 25, 1938, Station WHDH in Boston, Massachusetts, a class II station licensed to operate during the daytime only on the frequency 830 kilocycles (a class I-A channel) with power of 1 kilowatt, applied to the Commission for modification of its license so that it could operate both night and day on that frequency with increased power of 5 kilowatts. At that time Station KOA in Denver, Colorado, was the dominant class I station on the frequency 830 kilocycles, operating unlimited time

with power of 50 kilowatts. Since the Commission's Rules provided for the assignment of only one station to operate at night on the frequency 830 kilocycles, the WHDH application could not be granted without amendment of § 3.25.

Section 309(a) of the Act specifies the procedure which the Commission must follow in passing upon applications for modification of licenses, such as that of WHDH: "If upon examination of any application for . . . modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize . . . modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe." The Commission, upon its examination of the WHDH application, was unable to find that a grant would serve the public interest, convenience, or necessity. The application was therefore, on September 2, 1939, designated for hearing. Three weeks later, on September 23, 1939, KOA filed a petition to intervene. Its petition, in substance, alleged only that the proposed operation of WHDH would "cause interference to station KOA in areas where KOA's signal is now interference free", that KOA "would be aggrieved and its interests adversely affected" by the proposed operation, and that a grant of the WHDH application would not be in the public interest, convenience, or necessity.

The Court holds that the Commission was required as a matter of law to grant KOA's petition to intervene in the hearing upon the WHDH application. In my judgment the Act precludes such a construction. Section 4(j) provides that the Commission "may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice"; § 303(r) authorizes it to make "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act". We have held that by force of these provisions "the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked—the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be al-

lowed to intervene in one another's proceedings, and similar questions—were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest." *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138.

The breadth of discretion entrusted to the Commission is limited, however, by §§ 303(f) and 312(b). The former provides that "changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with". Section 312(b) authorizes the Commission to modify outstanding station licenses "if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with: *Provided, however,* That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue."

The procedural scheme established by the statute is thus clear: if application is made for a station license, or for modification or renewal of a license, the Commission may grant such application without a hearing if it finds, upon examination of the application, that a grant would be in the public interest. If it is unable to reach such a determination from its study of the application, it must afford the applicant a "hearing". § 309(a). If a Commission order involves a change in the frequency, authorized power, or hours of operation of an existing station without its consent, such licensee is entitled to a "public hearing". § 303(f). If a Commission order involves "modification" of an outstanding license, presumably something other than a change in frequency, power, or hours of operation, the modification order cannot become effective until the licensee is given notice in writing and a "reasonable opportunity to show cause why such an order of modification should not issue". § 312(b). It is relevant

here, also, that under § 312(a) a Commission order revoking a station license cannot take effect "until fifteen days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the licensee. Such licensee may make written application to the Commission at any time within said fifteen days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of revocation." The Act explicitly provides for a "hearing", therefore, when the Commission proposes to deny an application for a license, or to revoke a license, or to change the frequency, power, or hours of operation of a station licensee. But when a Commission order merely involves "modification" of the license of an existing station, the latter is entitled only to notice in writing and a "reasonable opportunity to show cause" why the order should not issue.

The Commission has exercised the authority given it by Congress to formulate its administrative procedure. Section 1.102 of its Rules, relating to intervention in Commission proceedings by interested parties, provides as follows:

"Petitions for intervention must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, the facts on which the petitioner bases his claim that his intervention will be in the public interest, and must be subscribed or verified in accordance with section 1.122. The granting of a petition to intervene shall have the effect of permitting intervention before the Commission but shall not be considered as any recognition of any legal or equitable right or interest in the proceeding. The granting of such petition shall not have the effect of changing or enlarging the issues which shall be those specified in the Commission's notice of hearing unless on motion the Commission shall amend the same."

Under an earlier rule any person could intervene in a Commission proceeding if his petition disclosed "a substantial interest in the subject matter". § 105.19, Commission's Rules and Regulations (1935). The reasons for the change in the Commission's intervention rule were thus stated by the Attorney General's Committee on Administrative Procedure, Sen. Doc. No. 186, 76th Cong., 3d Sess., Pt. 3, pp. 16-17: "The effects of this complete freedom of intervention [available under the old rule] upon the Commission's activities were very marked. Not only

was the record unnecessarily prolonged by the discussion of non-controversial issues, but the evidence relevant to each issue was increased manyfold by virtue of the extended cross-examination of witnesses by each intervener. More often than not the interveners presented no affirmative evidence on the issues at hand. The major functions served by them were apparently to impede the progress of the hearing, to increase the size of the record, and to obfuscate the issues by prolonged and confusing cross-examination. Nor were these dilatory and destructive tactics restricted to the hearing itself. Each intervener would customarily avail himself of his rights to take exceptions to the examiner's report, to oral argument before the Commission, and, in many cases, to appeal from the Commission's order to the District of Columbia Court of Appeals. . . . If this [new] provision is enforced intelligently and forcefully, an important step will have been taken both toward the protection of applicants and the increase of the Commission's prestige." Compare *In re Hazelwood, Inc.*, 7 F. C. C. 443.

KOA's petition for intervention was denied, presumably because the showing required by § 1.102 had not been made. And on January 29 and 30, 1940, a hearing upon the WHDH application was held before an examiner of the Commission. Although KOA was denied the right to intervene, it could, under § 1.195 of the Commission's Rules, have appeared and given evidence. That rule provides that the Secretary of the Commission shall maintain "a record of all communications received by the Commission relating to the merits of any application pending before the Commission", and if the application is designated for hearing, the Secretary must notify all persons who have communicated with the Commission regarding the application "in order that such persons will have an opportunity to appear and give evidence at such hearing." Under this rule if KOA had appeared at the hearing upon the WHDH application, it would have been entitled to present evidence relating to the matters raised in its petition for intervention. But, so far as the record before us shows, it made no effort to take advantage of the right of participation afforded it by § 1.195.

On December 9, 1940, the Commission issued proposed findings and conclusions. Under these the Commission found that the proposed operation of WHDH, with use of a directional antenna,

"would not cause any interference to the primary service of Station KOA, Denver, Colorado, and that such interference as the proposed operation of WHDH might reasonably be expected to cause to reception of KOA would be limited to receivers in the eastern half of the United States"; that the operation of WHDH as proposed in its application would "enable it to deliver service of primary signal quality to an area having a population of 3,093,000 or to 621,000 more people than are now included within the primary service area of the station"; that by extending WHDH's hours of operation "a new primary service to 94.9% of the Boston metropolitan area, including a population of 2,185,000", would be provided; that, in addition to the improved service to listeners in the Boston area, there would be "an improvement and extension of service which applicant station [WHDH] now endeavors to render over the fishing banks situated off the New England coast"; and that the public interest would be served by amending § 3.25 of the Rules so as to make the frequency 830 kilocycles a I-B channel, upon which more than one station could operate at night, thereby permitting "more efficient use of the frequency".

On December 16, 1940, KOA again petitioned to intervene. Its petition alleged only that the proposed action, if adopted, would result in "interference to Station KOA in areas where KOA's signals are now interference free", would constitute a modification of KOA's license without affording it an opportunity to be heard, and would result in "a degradation of service on 830 kc which will be prejudicial to the priority rights in the United States on this channel, will discriminate against service to rural listeners in order to furnish additional service to the City of Boston which is already well served". KOA made no offer to contradict or add to the evidence adduced at the hearing, nor did it dispute the Commission's conclusions as to the extent of the interference which KOA would suffer from the proposed operation of WHDH. Accordingly, on January 7, 1941, the Commission denied KOA's second petition to intervene, but it permitted KOA, as well as other "clear channel" stations interested in the proceeding, to participate in the oral argument before the Commission, and to file briefs *amicus*, in order to determine whether the proposed findings should be made final.

Meanwhile, on January 23, 1941, the President proclaimed the North American Regional Broadcasting Agreement, 55 Stat. 1005.

The purpose of this Agreement, which was concluded at Havana on December 13, 1937, among Canada, Cuba, Dominican Republic, Haiti, Mexico, and the United States, was to "revise and establish principles covering the use of the standard broadcast band in the North American Region so that each country may make the most effective use thereof with the minimum technical interference between broadcast stations". The signatory Governments recognized that "until technical developments reach a state permitting the elimination of radio interference of international character, a regional arrangement between them is necessary in order to promote standardization and to minimize interference." The Agreement established priorities in the use of specified clear channels, sixty-three of which were assigned to the United States, and provided that each such channel "shall be used in a manner conforming to the best engineering practice with due regard to the service to be rendered by the dominant stations operating thereon".

In order to carry out the provisions of the Agreement, the United States was obliged to make extensive adjustments in the assignments of its existing stations. As part of the accommodations required, stations assigned to the frequency 830 kilocycles were to be moved to 850 kilocycles. This change affected both WHDH and KOA. The license of KOA, like that of all other standard broadcast stations, would have expired on August 1, 1940, while the WHDH application was pending. The licenses of all stations, including KOA and WHDH, were successively extended by the Commission, first to October 1, 1940, and then to March 29, 1941, the effective date of the Agreement. KOA had filed an application for renewal of its license to operate on 830 kilocycles, 50 kilowatts, unlimited time. On February 4, 1941, the Commission advised all applicants for renewals, including KOA, that under the Agreement, their operating assignments were to be changed and that their applications for renewals would be regarded as applications to operate upon the new frequencies, unless the applicant wished to operate upon some other frequency, in which event its application would be designated for hearing. So far as appears, KOA did not notify the Commission that it had any objection to its renewal application being regarded as an application to operate on the frequency 830 kilocycles. Accordingly, when its license to operate on 830 kilocycles expired on March 29,

1941, its license was renewed on the frequency 850 kilocycles. In no sense, therefore, did the action of the Commission changing KOA's frequency assignment pursuant to the North American Regional Broadcasting Agreement constitute a modification of KOA's license. And, indeed, KOA makes no such contention here. for review of Commission orders modifying station licenses, upon the Commission's own motion, can be reviewed only in a suit brought in a district court under § 402(a). See *Scripps-Howard, Radio Inc.* v. *Federal Communications Comm'n*, 316 U. S. 4, 8-9, note 3.

On March 26, 1941, three days before the Agreement was to become effective, the Commission issued an order adopting the proposed findings and conclusions upon the WHDH application, granting WHDH authority to operate on 850 kilocycles, with power of 5 kilowatts, day and night, and amending § 3.25 of its Rules so as to make the frequency 850 kilocycles a I-B channel upon which more than one station could operate at night. This order was made effective April 7, 1941.

On April 25, 1941, KOA filed a petition for rehearing before the Commission, repeating in substance the allegations contained in its earlier petitions to intervene. And on May 20, 1941, the Commission, in an opinion that considered in detail each of the allegations in the petition for rehearing, denied the petition. The Commission stated that, "in view of the importance of the matters involved in this proceeding, we shall re-examine our findings and conclusions and the record upon which they are based." In summary, it found that a grant of the WHDH application "would not result in interference to the primary service of Station KOA, Denver, Colorado, and that such interference to the reception of Station KOA as might reasonably be expected to result from a grant of the Matheson [WHDH] application would occur in its secondary service area and would be limited to receivers in the eastern half of the United States, remote from the KOA transmitter; that such secondary service as KOA could render in this area would be of uncertain character because of its dependence upon the characteristics of the individual receiver, the signal intensity and the signal to interference ratio involved in each individual case"; and "that although petitioner [KOA] contends it is entitled to serve the rural areas in which it is claimed interference will occur, it fails to allege either that it has been providing a useful service in such areas or point out, in terms of population, the nature and extent of the claimed interference."

On June 7, 1941, KOA filed an appeal from the Commission's order in the Court of Appeals for the District of Columbia under § 402(b)(2) of the Communications Act of 1934. Section 402(b) provides for appeals to the Court from decisions of the Commission "in any of the following cases: (1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission. (2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application."

The court below could not take jurisdiction of the suit unless KOA had a right to appeal under § 402(b)(2), in other words, unless it was "aggrieved" or its "interests were adversely affected" by the granting of the WHDH application. Since the Commission in exercising its licensing function must be governed by the public interest and not the private interest of existing licensees, an appellant under § 402(b)(2) appears only to vindicate the public interest and not his own. *Federal Communications Comm'n* v. *Sanders Radio Station*, 309 U. S. 470; *Scripps-Howard Radio, Inc.* v. *Federal Communications Comm'n*, 316 U. S. 4. That the Commission's order may impair the value of an existing station's license is in itself no ground for invalidating the order; it merely may create standing to attack the validity of the order on other grounds. Whatever doubts may have existed as to whether the ingredients of "case" or "controversy", as defined, for example, in *Muskrat* v. *United States*, 219 U. S. 346, are present in this situation were dispelled by our ruling in the *Sanders* case that the legality of a Commission order can be challenged by one "aggrieved" or "whose interests are adversely affected" thereby, even though the source of his grievance is not what is claimed to make the order unlawful. But from this it must not be concluded that anyone who claims to be "aggrieved" or who is in any way adversely affected by Commission action has a right to appeal. As the prevailing opinion in the Court of Appeals pointed out: "In the present stage of radio, very few changes, either in frequency or in power, can be made without creating some degree of electrical interference. This may range from minute and practically harmless interruption with remote and very occasional listeners in secondary service areas to total obliteration in the primary field. . . . It seems not unreasonable to read

the [*Sanders*] opinion as requiring by implication that there be probable injury of a substantial character. So much by way of limitation seems necessary to prevent vindication of the public interest from turning into mass appeals by the industry at large, with resulting hopeless clogging of the administrative process by judicial review. Likewise, with electrical interference, it is hardly necessary to secure appellate championship by every broadcaster who may be affected in only a remote and insubstantial manner." 132 F. 2d 545, 548.

In order to establish its right to appeal, therefore, KOA had to make a showing that its interests were substantially impaired by a grant of the WHDH application. This, the record makes clear, it failed to do. In its notice of appeal to the court below, KOA made only a general allegation, what courts normally regard as a conclusion of law, that the Commission's action resulted in a "substantial modification" of its license. No supporting allegations of fact were tendered. There was no claim that KOA's economic position was in any way impaired, or that the proposed operation of WHDH would cause substantial interference with KOA, or that such operation would result in a substantial loss of listeners to KOA, or that any areas of substantial size would no longer be able to receive satisfactory service from KOA. Neither in its petitions for intervention, nor in its petition for rehearing before the Commission, nor in its notice of appeal to the court below, did KOA specifically challenge the correctness of the Commission's findings.

The record affords no basis, therefore, for finding that KOA had standing to appeal from the grant of the WHDH application. But even if it had, I do not believe that KOA was afforded less opportunity to participate in the proceedings before the Commission than the statute requires. Assuming that the grant of the WHDH application constituted a "modification" of KOA's license in the sense that the scope of the operations authorized by KOA's license was thereby limited, only § 312(b) would come into operation. Section 303(f) is inapplicable because the grant of the WHDH application unquestionably did not change KOA's frequency, power, or hours of operation. Both before and after the Commission's action, KOA's operating assignment was precisely the same: 850 kilocycles, 50 kilowatts, unlimited time. And so the only question on this phase of the case is —was KOA afforded such opportunity of participation in the

WHDH proceeding as § 312(b) requires? That section provides that no order modifying the license of any existing station "shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue."

KOA does not claim that it did not have sufficient notice, formal and otherwise, of the proceedings upon the WHDH application. Nor can there be any doubt that it had ample and "reasonable opportunity to show cause" why WHDH's application should not be granted. Under § 1.195 of the Commission's Rules it could have appeared and given evidence at the hearing upon the WHDH application. That it did not take advantage of such an opportunity is certainly no reason for saying that it had none. KOA was permitted to argue before the Commission that the proposed grant of the WHDH application should not be made final. It submitted a petition for rehearing which the Commission considered on its merits and which the Commission denied only after a detailed review of all the contentions made by KOA.

The Court holds, nevertheless, that the Commission was required to afford KOA more than all these opportunities to show cause. Section 312(b) is construed to require a hearing in which the licensee whose interests may be affected is entitled to intervene as a formal party. Such a construction appears to me to disregard the structure and language of the legislative scheme. Congress might have been explicit and provided in § 312(b) that every licensee whose interests may be affected by Commission action shall be entitled to a hearing as an intervenor in the proceeding. As has been noted, the draftsmen of the Communications Act of 1934 knew how to use apt words when they wished to afford parties before the Commission the right of "hearing". Section 309(a) requires the Commission to afford an applicant for a license a "hearing", not notice and an opportunity to show cause, before the application can be denied. Section 312(a) gives a licensee a "hearing", not notice and an opportunity to show cause, before its license can be revoked. Section 303(f) provides that the Commission cannot change the frequency, authorized power, or times of operation of a licensee unless it affords such licensee a "public hearing", not merely notice and an opportunity to show cause. But, for reasons which it deemed sufficient, Con-

gress did not choose to make this technical requirement of a "hearing" in specifying the procedure for the protection of licensees who might be affected by Commission action. Congress may well have desired to avoid the litigious waste so abundantly established by the voluminous cases to which the claim of intervention in courts has given rise. The requirement of notice and an opportunity to show cause is not the equivalent of the requirement of a "hearing". By imposing this requirement for the adequate protection of substantial interests Congress charged the Commission with the duty of devising appropriate procedure which would "best conduce to the proper dispatch of business and to the ends of justice." § 4(j). The Commission's response was §§ 1.102 and 1.195 of its Rules.

Can it seriously be claimed that the Commission acted beyond its authority in providing that before a licensee can intervene in another proceeding he must indicate some solid ground by setting forth "the facts on which the petitioner bases his claim that his intervention will be in the public interest"? Otherwise anyone who asserts generally that the grant of another's application will affect his license may become a party to a proceeding before the Commission and may, to the extent to which a party can shape and distort the direction of a proceeding, gain all the opportunities that a party has to affect a litigation although he has not made even a preliminary showing that his intervention will be in the public interest. I cannot read the requirement for "reasonable opportunity to show cause why such an order of modification should not issue" as a denial to the Commission of power to make such a reasonable rule for sifting the responsibility of potential intervenors. And if the Commission's rule for intervention was within its discretionary authority in formulating appropriate rules of procedure for the conduct of its proceedings, it is equally clear that the Commission, in the circumstances of this particular case, was justified in finding that KOA made no substantial claim that the grant of the WHDH application would impair KOA's economic interests or entail a substantial loss of listeners or make any appreciable inroads upon any areas served by KOA or otherwise substantially affect its interest or that of the public.

To deny to the Commission the right to require a preliminary showing, such as was found wanting here, before admitting a petitioner to the full rights of a party litigant is to fasten upon the

Commission's administrative process the technical requirements evolved by courts for the adjudication of controversies over private interests. See *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 142-44. It is to assume that the modes familiar to courts for the protection of substantial interests are the only permissible modes, regardless of the nature of the subject matter and the tribunals charged with administration of the law. This is to read the discretion given to the Federal Communications Commission to fashion a procedure relevant to the interests for the adjustment of which the Commission was established through the distorting spectacles of what has been found appropriate for courts. We must assume that an agency which Congress has trusted is worthy of the trust. And especially when sitting in judgment upon procedure devised by the Commission for the fair protection of both public and private interests, we must view what the Commission has done with a generous and not a jealous eye.

Mr. Justice DOUGLAS dissenting.

While I am in substantial agreement with the views expressed by Mr. Justice FRANKFURTER, there are a few words I desire to add on one phase of the case.

I agree with the Court that if as we held in the *Sanders* case (309 U. S. 470) a person financially injured by the grant of a license has a standing to appeal, so does one whose station will suffer from electrical interference if the license is issued. I expressed my doubts, however, in *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4, 20-21, whether Congress endowed private litigants with the power to vindicate the public interest when it gave the right to appeal under § 402(b) to a person "aggrieved or whose interests are adversely affected" by a decision of the Commission. I also expressed my concern in that case with the constitutionality of a statutory scheme which allowed one who showed no invasion of a private right to call on the courts to review an order of the Commission. See *Muskrat* v. *United States*, 219 U. S. 346. But if we accept as constitutionally valid a system of judicial review invoked by a private person who has no individual substantive right to protect but who has

standing only as a representative of the public interest,[1] then I think we must be exceedingly scrupulous to see to it that his interest in the matter is substantial and immediate. Otherwise we will not only permit the administrative process to be clogged by judicial review; we will most assuredly run afoul of the constitutional requirement of case or controversy. *Federal Radio Commission v. General Electric Co.*, 281 U. S. 464.

Any actual controversy which may now be present in this case is between KOA and the Commission. Any controversy which existed between WHDH and the Commission has come to an end. *United States v. Alaska S. S. Co.*, 253 U. S. 113, 116. The interest, if any, of the appellant KOA is the interest of a private person and accordingly must be measured in terms of private injury. That interest must be substantial and immediate if the standard of the statute and if the constitutional requirements of case or controversy, as interpreted by the *Sanders* and the *Scripps-Howard* cases, are to be satisfied. It is necessary to show in effect that KOA has sustained or is about to sustain some direct and substantial injury (see *Massachusetts v. Mellon*, 262 U. S. 447, 488)—an injury which for the purpose of this case must result from electrical interference. The *Sanders* case and the *Scripps-Howard* case do not dispense with that requirement. They merely hold that an appellant has his case decided in light of the standards of the public interest, not by the criteria which give him a standing to appeal.

I do not understand that the opinion of the Court takes a contrary view. It only holds on this phase of the case that KOA made an adequate showing under § 402(b). I disagree with that conclusion.

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[1] Referred to as a sort of King's proctor by Edgerton, J., in Colorado Radio Corp. v. Federal Communications Commission, 118 F. 2d 24, 28; and as "private Attorney Generals" by Frank, J., in Associated Industries of N. Y. State, Inc. v. Ickes, — F. 2d —.